

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ATLANTA BRANCH OFFICE  
DIVISION OF JUDGES

HEBREW HOME OF SOUTH BEACH, INC.

and

Cases 12-CA-23633  
12-CA-24055  
12-CA-24141

DORA ZALDIVAR, an Individual

*Susy Kucera, Esq.* for the General Counsel.  
*Steven Schwartz, Esq. (Steven Schwartz, P.A.),*  
of Aventura, Florida, for the Respondent.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon charges filed beginning January 15, 2004, by Dora Zaldivar against Hebrew Home of South Beach, Inc. (Respondent), in Cases 12-CA-23633, 12-CA-24055, and 12-CA-24141, a consolidated complaint (hereinafter referred to as complaint) was issued on December 6, 2004,<sup>1</sup> alleging that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by (a) on or about October 8, 10, 12, and 15, 2003, in or about mid-January 2004, and on or about February 2 and 17 issuing Zaldivar written warnings, (b) on or about October 8, 2003, issuing Zaldivar a negative performance evaluation, (c) on or about October 20, 2003, demoting Zaldivar from dietary assistant supervisor to dietary assistant, (d) since on or about October 20, 2003, harassing Zaldivar, through Martha Blanco, and/or closely monitoring Zaldivar's work, (e) on or about April 6, issuing Zaldivar a written warning, (f) on or about April 15, threatening, through Jesse Dunwoody, Zaldivar with suspension and discharge and issuing her a written warning, and (g) on or about October 28 by Dunwoody and Blanco, denying Zaldivar light duty work, and (2) violated Section 8(a)(1) and (4) of the Act by discriminating against Zaldivar for filing charges or giving testimony under the Act, by the conduct set forth in (1)(e) through (g) above. Respondent denies violating the Act as alleged.

A trial was held in this matter on December 13 and 14 in Miami, Florida. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

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<sup>1</sup> The complaint was amended, with no objection from the Respondent, at the trial herein to include additional allegations regarding alleged unlawful warnings. Unless indicated otherwise, all dates are in 2004.

The Respondent, a Florida corporation with an office and place of business in Miami Beach, Florida, has been engaged in the business of operating skilled nursing facilities. Respondent admits, and I find, that during the 12 months before the complaint was issued in conducting its business operations it derived gross revenues in excess of \$100,000 and purchased and received at its facility goods and materials valued in excess of \$10,000 directly from points outside the State of Florida; and that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, Respondent admits, and I find that at all material times, SEIU 1199 Florida (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

At the outset of the trial herein, the parties stipulated that Zaldivar was a Section 2(11) supervisor under the Act. (transcript pages 8 and 9)

Respondent has seven facilities in the south Florida area. The one involved here, its South Beach, Florida facility, has 102 beds, an average census of about 99 residents, and about 100 to 110 employees.<sup>2</sup> Respondent has between 12 and 18 employees in the Dietary Department at its South Beach facility. Blanco has been the Dietary Manager or Food Service Director at this facility for about 35 years. At the time of the trial herein, she was the only supervisor in that department. Dunwoody, the Administrator of the facility for the last eight years, testified that the only department head in the facility who has an assistant supervisor is the Director of Nursing.

Zaldivar began working for Respondent in 1984 as a Dietary Clerk, the job description for which was received as General Counsel's Exhibit 4. In 1996 Zaldivar's title changed to assistant food service supervisor. The job description of Food Service Supervisor was received as General Counsel's Exhibit 5. Dunwoody testified that the description is close to being about the same as dietary assistant manager; and that Zaldivar worked in the same office as Blanco. On cross-examination Zaldivar testified that she was a member of the Union from the beginning, Blanco told her she could be a member of the Union, and Blanco never told her that she should not be a member of the Union.

Zaldivar testified that six or seven years ago her title was changed to dietary assistant supervisor; that her job duties in this position included (a) interviewing new employees, filling out all of the necessary papers, and getting them signed and copied, (b) preparing the dietary employees' schedules, (c) ordering food and supplies, preparing purchase orders, receiving deliveries, checking invoices, revising invoices, and reporting to the main office all of the expenses in the different categories, (d) interviewing patients with respect to nutrition and making a record, and (e) reprimanding employees. Zaldivar further testified that she wrote one written warning; that Blanco, the dietary manager, was her immediate supervisor; that when she was not in the kitchen, in the dining room or on the floors, she worked in an office with Blanco; that she supervised the dietary employees when Blanco was not in the facility; that she is certified as a dietary manager and General Counsel's Exhibit 18 is her certificate, which she received in 1996 after taking a course for almost four years; that to maintain her certificate she

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<sup>2</sup> The collective bargaining agreement effective to September 30, and the tentative agreement between Respondent and the Union dated November 11 were received, respectively, as General Counsel's Exhibits 2 and 3. The latter extends the former an additional three years.

has to go to seminars to accumulate 45 credits every three years; that General Counsel's Exhibit 19 is her Dietary Managers Association card which expires on "8/31/05"; that as dietary assistant manager she also worked temporarily at another Hebrew Home facility in July 2003 at the behest of Diane Loechner, who is the dietician, and Nick Antonacci, who works for the management company; that she worked as dietary manager at the other facility because there was a re-inspection of the facility and the dietary manager who usually was in charge at the other facility did not have a dietary manager's certificate; and that Loechner and Blanco, who is almost 80 years old, told her that when Blanco retired she would get the dietary manager's position. On cross-examination Zaldivar testified that in the seven years that she was dietary assistant supervisor she wrote one or two employees up but she usually took a verbal approach; that she never signed the papers but rather she prepared them for Blanco to sign because she was the dietary manager; that she signed the write up but Blanco had to sign also; that she could have prepared a write up for Blanco's signature to document a verbal warning she gave someone; and that if she was given Blanco's job she would not want to be in the Union because she would be part of the administration, which is "a different story." (transcript page 117) On redirect Zaldivar testified that she was not required to consult with Blanco before issuing a verbal warning but she would tell Blanco afterwards.

Loechner, who is a consultant dietician who spends approximately 24 hours a month at Hebrew Home of South Beach, testified that she oversees the food service department in the kitchen and the clinical management of the nursing home ensuring that they're in compliance with Federal and State regulations; that Zaldivar was the acting Dietary Manager at Hebrew Home's North Dade, Florida facility temporarily replacing Bernice Bird at that facility; and that Zaldivar tried to make changes at that facility. On cross-examination Loechner testified that Bird was not a certified dietary manager; that Respondent needed a certified dietary manager at its North Dade facility; that Bird was working as a dietary manager even though she was not a certified dietary manager; that Respondent asked Zaldivar to fill in for Bird for a while because Zaldivar was a certified dietary manager; and that Zaldivar was at the facility helping with an inspection "Yes, but they had inspection and she wasn't there for the inspection." (transcript pages 177 and 178) Dunwoody testified that Zaldivar temporarily filled a position at North Dade because of a State survey and she did not receive any write-ups due to her performance as a dietary manager during that time.

On rebuttal Zaldivar testified that she was concerned about working at the North Dade facility because she was not really the full-time dietary manager there, she was just there because Bird did not have her certification and they were expecting an inspection at the time, and she asked Loechner if this would cause a problem with her certification; that while she was at North Dade she washed a big wall and counters with Bird and they went to meetings in the Administrator's office; that when she completed her work at North Dade neither Blanco nor Dunwoody told her that her work was unsatisfactory; that she has never refused to perform work as a dietary manager; and that she never told anyone at the North Dade facility that she wanted to switch things around because that would have been ridiculous since she was not really the dietary manager there and she only worked there for five days.

When called by Counsel for General Counsel, Dunwoody testified that Blanco told him that she had written up Lazaro Santana, who was a dietary assistant, and Santana called the Union; that the Union representative came into the facility and met with her, Zaldivar, and the employee; and that the Union representative asked to see the write up, Blanco gave him her only copy, and the Union representative tore it up. Dunwoody further testified that it was his understanding that Zaldivar had embarrassed Blanco, Blanco felt that Zaldivar was disloyal and had not supported her, and Blanco felt like she was made to look like a fool in front of the Union representative. It was conceded by Dunwoody that part of the grievance procedure pursuant to

the collective bargaining agreement involves a meeting with the Union. But Dunwoody testified that if he is not involved in the meeting between the Union representative and the department head, as far as he was concerned the meeting “didn’t happen ... because it’s not official.” (transcript page 30)<sup>3</sup> When asked by Counsel for General if he felt that Zaldivar’s conduct in not supporting Blanco at the meeting was not fitting for a supervisor, Dunwoody testified as follows:

I felt like she had a disagreement with Ms. Blanco. Those things should have been aired privately and hopefully prior to any meeting with the Union representative, or if not able to be held prior to the Union meeting with a Union representative, at least exit and caucus, if you will, and discuss it and maybe get me involved, certainly if they need assistance in deciding ... what should be, or what shouldn’t be. [Transcript page 30, Emphasis added]

Dunwoody testified further that after the grievance meeting Zaldivar and Blanco had a difficult relationship at work.

Zaldivar testified that in September 2003 Santana, who worked as a pot washer, received a written warning; that Blanco wrote out the warning for Santana and she gave it to her on Friday to give to Santana the following day because he was not there on Friday, and Blanco would not be at the facility on Saturday when Santana and Zaldivar were working; that when she gave the warning to Santana on Saturday he would not sign it, indicating that it was not true and he was not at the facility on the day in question; that the warning referred to a situation where Mirtila Tabora went to use some trays to place deserts in the refrigerator and she noticed that the trays were greasy in that they were not washed properly; that she and Blanco were present when Tabora discovered the greasy trays and Blanco said that she was going to write up Santana, he was a “pig” and “[t]hat must be Lazaro, the pig of Lazaro” (transcript page 55); that Blanco wrote Santana up and said that Tabora told her that the trays were not used the day before, when Santana was not at work; that she heard Tabora tell Blanco that she did not say this; that Santana was off the day before and “[I]t was another girl covering for him” (*Id.*); that she told Blanco that if she was going to give a written warning, she had to do it for both Santana

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<sup>3</sup> The following language appears at page 24 in General Counsel’s Exhibit 2:

ARTICLE 19  
GRIEVANCE PROCEDURE

19.1 The parties agree that as quickly as possible any and all disputes, grievances or complaints arising between the parties hereto, under, out of, or in relation to this Agreement, or in the interpretation, application, performance, termination or any alleged breach thereof, shall be processed in the following manner:

STEP 1 In the first instance, and within seven (7) days from the occurrence of a dispute, grievance, or complaint, a grievance shall be taken up between the grievant and/or his/her Union representative and his/her immediate supervisor. The supervisor shall answer the grievance in writing within two (2) days after such meeting.

Should the grievant fail to file a grievance in Step 1 s/he may proceed immediately to Step 2 within the same time frame.

STEP 2 After receiving the supervisor’s response in Step 1, if the Union is not satisfied, the Union shall present the written grievance to the Administrator or her/his designee within five (5) days. Unless mutually agreed otherwise, the grievant, her/his Union representatives and the Administrator, shall meet in an effort to resolve the grievance within five (5) days after receipt of the grievance by the Administrator (unless extended by mutual agreement). The Administrator shall answer the grievance in writing within two (2) days after such meeting.

[Emphasis in original.]

and the woman who covered for him the day before because she did not know who left the trays dirty; that Blanco said "no because the other lady wash the pots good and it must be Lazaro" (transcript page 56); that Santana filed a grievance with the Union and there was a grievance meeting a few days after the incident with the trays, which occurred on September 16 or 17; that she was called to the grievance meeting by Blanco; that Blanco, Santana, Tabora, and Union representative Grossberg Miranda were present; that Santana told Miranda that it was not fair because he was not there the day Blanco was accusing him of washing the involved trays; that when Blanco asked her if she heard Tabora say that no one washed the pots the day before, she said that Tabora never said that; that she then left the office; and that after this everything changed in that (a) Blanco hardly spoke to her, (b) Blanco did not give her any information about admissions, deaths, if someone went to the hospital, or if a diet was changed, (c) Blanco started placing orders, which is something Blanco had not done before, without telling her, (d) Blanco locked the file cabinet with the employees' files in it, after another incident, so she could not access the files to inform employees when they were due to take their annual TB test, and (e) Blanco told her that they were not going to the Cisco seminar, which she and her husband had taken Blanco to for ten years, and she later learned that Blanco attended the seminar alone. On cross-examination Zaldivar testified that the day Santana was off, Maria Eugenia Gomez cleaned the pots and Blanco did not want to write her up; and that the trays are baking trays that the cooks use every day and so it could not be determined that the last time the trays were used was on Santana's watch. On redirect Zaldivar testified that before the grievance meeting involving Santana, she never received a bad performance evaluation or a verbal or written warning; that after the incident with Santana, Dunwoody asked her, in one of the meetings she had with him with the Union representative present, why she belonged to the Union; and that she told Dunwoody that nobody told her that she could not belong to the Union since the beginning.

Subsequently Zaldivar testified that before the grievance meeting involving Santana, she told Blanco not to call her as a witness because "she was doing wrong, writing out Lazaro [Santana]" (transcript page 128); that Blanco called her anyway so she knew the purpose was to testify against Santana; that Blanco told her she was a witness and Blanco was going to call Tabora to say that nobody used the trays the day before which would mean that the last time they were used was on the day Santana was there; that she told Blanco that Tabora never said this; that when she was called Tabora told Blanco that she never said that to Blanco; that Blanco got angry and said "you have a bad memory" (transcript page 129); and that she and Tabora then left Blanco's office while Blanco, Santana, and Miranda stayed in the office.

Regarding the warning to Santana, Tabora testified that

One day in September, Lazaro Santana was off. I was going to prepare some jello. The jellos are prepared in a big tray that I use in the oven. I grabbed one of the trays from the shelves and when I placed it on the wood, it was like greasy. You could tell it was dirty.

The lady, Mrs. Blanco was behind me and she noted that the tray was dirty and she made a comment that that was the work of the pig Lazaro. And I told her that I didn't know.

And then she asked Mrs. Dora [Zaldivar] because she was coming towards where we were working, and she didn't know either, because at the time there were two people that did the same kind of work.

....

Mrs. Blanco had said that ... I had said that those trays had not been used and she said that she didn't hear that I said nothing because the truth is that I didn't answer anything and I didn't know who had washed those trays. [Transcript pages 134 and 135]

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With respect to the grievance meeting, Tabora testified that Santana filed a grievance and called Union representative Miranda; that there was a grievance meeting in Blanco's office; and that

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Well, at the beginning there was only Mrs. Blanco, Mr. Lazaro, and Mr. Miranda. Afterwards, they call me and they call Mrs. Dora Zaldivar to confirm the words that Mrs. Blanco has said, that I said that those trays had not been washed, which I did not say.

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I denied it to her and I denied it to Mr. Miranda, and I told her, no, that at no time did I ever say those words. And I explained that I couldn't have said those words because I wasn't attentive to who uses or who does not use those pots or trays.

....

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[Blanco] ... told both of us that we were very forgetful, that I did say those words, and that at that time we had made believe that we forgot.

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She referred to - - she was putting words in my mouth that I have never said and she referred to that I have supposedly forgot what I have said. [Transcript page 136 and 137]

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Tabora further testified that during the Santana grievance meeting Zaldivar gave the same answer to Blanco that she gave to Blanco because the question was for her and Zaldivar; that Blanco turned red and became upset; that when she confirmed what she had said, Miranda requested the warning Blanco had drafted against Santana, saying there was no proof against Santana; and that a few days later Zaldivar lost her position as dietary assistant supervisor.

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Santana testified that he received a warning in September 2003 for dirty trays; that the day they found the dirty trays he was off and when he came in the next day Zaldivar told him that Blanco had given him the warning and she knew that he was not working that day; that when he received a copy of the warning, he telephoned Union representative Miranda who came to Blanco's office; that Blanco told Miranda that Santana left some dirty trays and she had two witnesses to the fact that he left dirty trays; that he was not working on the day in question; that Blanco called Tabora and Zaldivar to her office; and that Blanco

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said that ... Tabora had said that those trays were used the day before and ... [Tabora] said that no, at no time had she ever said that to the lady.

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Then she asked ... [Zaldivar] if she had heard that ... [Tabora] has said that and she says no, that she says, Zaldivar says that she never heard Tabora say that. [Transcript page 152]

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Santana further testified that Blanco was pretty upset and she said that he wanted to put the blame on the other person that washed the dishes that day; that Miranda asked for the warning and Blanco gave it to him; that Miranda tore the warning up and Blanco said "that's no problem" (*Id.*); that Zaldivar started working in the kitchen shortly after that, in October 2003; and that

subsequently he told Blanco that what she did to Zaldivar was an injustice.

Blanco testified that Tabora brought the dirty trays to her attention; that she said that she had to write up Santana because he was the one who washed that tray; and that she knew that  
5 Santana was the one who washed the tray because

that tray we use generally for gelatin and things like that. And the day before, we didn't make gelatin in the kitchen or anything. That tray was washed the day - - not the day before, but the day before. And I know he was the one that washed the trays. [Transcript  
10 page 223 and emphasis added]

Blanco further testified that she knew it was Santana because he was the pot washer, he was the one who was supposed to wash the trays; that she did not think that anyone else could have washed the tray; that Santana called the Union and Miranda came to her office unannounced,  
15 asking to see the warning to Santana; that Zaldivar signed the warning with her as a witness that the trays were dirty; and that Miranda grabbed the warning from her hands and ripped it up, saying that "it was not valid because Mrs. Tabora denied that she called me, my attention for the trays, and that was no good and that's it." (transcript page 224) On cross-examination Blanco testified she did not call Tabora and Zaldivar into her office but rather Miranda called them into  
20 the office; that during the meeting with Miranda, Tabora said that she never told me that the trays were dirty, and she did; that Zaldivar "say like Mrs. Tabora, no, she didn't know anything. After she signed the warning, she said she didn't know anything about it" (transcript page 228); that she got the warning out of her desk when Miranda requested it; that she was not upset by Zaldivar's failure to support her at the meeting with Miranda "but it surprised me that after she signed a warning, she said that she didn't know anything about it. I didn't expect that from her"  
25 (transcript page 229); that Zaldivar was saying that there "was no reason for the warning because ... Santana, according to her, didn't wash the tray, or I don't know really what she was thinking" (transcript page 230); that she did not recall what Zaldivar said but Zaldivar denied that Tabora told her about the trays; and that the days that Santana was off, Gomez did his work.  
30 Subsequently Blanco testified that Zaldivar did not indicate to her that if she was going to give Santana a warning, then she should also give a warning to Gomez.

On rebuttal Zaldivar testified that she never signed the Santana warning. Subsequently she testified that she was off Sunday and Monday after giving Blanco's warning to Santana on  
35 Saturday, and on Tuesday when she returned to work Blanco asked her why she did not sign the warning and she told Blanco that she did not agree with the warning.

When called by the Respondent, Dunwoody gave the following testimony:

40 It is absolutely, positively out of the ordinary and totally unprecedented for the Union representative to come into the facility and meet with the department head without me being present.

Q. Have you heard of that happening any other time?

45 A. It's happened a couple of times and I've called him on the carpet about it, but generally they don't do that unless they think they can get away with it. I'm sorry, but that's my opinion. [Transcript pages 261 and 262]

50 General Counsel's Exhibit 7 is a warning notice to Zaldivar dated "10/2/03." The box for "FIRST WARNING NOTICE" is checked. Also the boxes for "Conduct" and "Attitude" are checked. The "Remarks" section of the form contains the following:

5 Mrs. Zaldivar is getting this warning because she search [sic] into confidential payroll records which were not at any one [sic] disposal and took photo static copy of a confidential document which she had in her pocket. This is an illegal act. I hope not to be repeated under any circumstances.

The warning is signed by Blanco. The following appears on the "Signature" line: "Refused to sign."

10 Zaldivar testified that Blanco did not give this warning dated "10/2/03" to her; that this refers to Ligia Castillo's record; that usually there is an HRS inspection in October and she was going through the employee records to make sure they were up to date with respect to health certificates, permits, etc.; that in Castillo's file she found a paper referring to a June pay increase to Castillo; that she showed the paper to Blanco and asked her "how come I ask for a  
15 raise and you told me that there is no raise for you or nobody and look at this" (transcript page 64); that Blanco told her that she did not deserve a raise; that she believed that her conversation with Blanco about the raise was an argument; that she had asked for a raise about two or three months before this conversation with Blanco and was told by Blanco that there would not be a raise for her or anyone else; that after showing the document about Castillo's  
20 raise to Blanco, she put the document back in the file; that when she had the conversation with Blanco about Castillo's raise, the office door was open and there were employees working in the kitchen about five or six feet from the office door; that normally she prepares the form for an employee to receive a pay increase and Blanco signs the form; that she had never seen Castillo's form before and Blanco had prepared it; that she had never been told that there were  
25 some documents that she did not have access to; and that the day after this incident a maintenance man put a lock on the file cabinet and on Blanco's desk, and the file cabinet was locked after this. On cross-examination Zaldivar testified that she was looking at Castillo's file in the file cabinet, which is next to Blanco's desk, and she spoke in a normal conversational tone when she raised the issue but the conversation got loud when Blanco and she then raised their  
30 voices; that one or two employees later told her that they overheard the conversation; and that she did not make a copy of the document she was discussing with Blanco and the document is still in the file. On redirect Zaldivar testified that she did not know if the company had a policy requiring employees to keep their pay confidential.

35 Castillo, who has worked at the involved facility for 20 years, testified that two of her coworkers received a raise in 2003 and she then asked Blanco for a raise; that Blanco said that she would speak to Dunwoody about it; and that approximately six months before she testified at the trial herein she received the raise.

40 General Counsel's Exhibit 8 is a warning notice to Zaldivar dated "10/10/03." The boxes for "Conduct" and "Attitude" are checked. The "Remarks" section of the form contains the following: "Mrs. Zaldivar exhibited insubordinate behavior i.e. yelling at me in the office with the door open allowing kitchen staff to hear. Called me a liar, been disrespectful to me." Blanco signed the warning. The "Signature" line is blank. Zaldivar testified that she never saw this  
45 warning before, it was never presented to her for her signature; and that she never called Blanco a liar but she did write a note on a warning that Dunwoody gave her on April 6, 2004, which was signed by three employees, that it was a prefabricated lie in order to write her up.

50 Blanco testified that Zaldivar called her a liar during their discussion about Castillo's raise in Blanco's office; that Zaldivar was loud, the office door was open, and all the people in the kitchen could hear; that Zaldivar had a document in her pocket which she had taken from Castillo's file which she used to demonstrate to Blanco that she knew that Castillo received a



raise; that Zaldivar took the document in her pocket when she left the office that day; and that the document has not been returned to the file to her knowledge. On cross-examination Blanco testified that she did not think about asking Zaldivar to close the office door during this conversation.

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General Counsel's Exhibit 9 is an employee warning to Zaldivar dated "10/12/03." The line for "3rd WRITTEN WARNING" is checked. Also, the line for "WORK NOT SATISFACTORY" is checked. The "COMPANY REMARKS" read as follows:

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After kitchen inspection done I found sheet pans, trays some dirty and wet stored [sic] in cook cabinet Deep fryer machine greasy and dirty. On [sic] locker room, sink dirty inside and underneath, grinding machine dirty, base dirty. Container to keep detergent and cleaning supplies dirty. Container with detergent labeled 'diet vanilla pudding.' Storage room in complete disorder and all containers dirty.

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The form was signed by Blanco. The "EMPLOYEE'S REMARKS" section is blank, and the box containing "I HAVE READ AND UNDERSTAND THE CONTENTS OF THE ABOVE ACTION, EMPLOYEES SIGNATURE, [and] DATE" is blank. Zaldivar testified that she never saw this warning before the trial herein; and that Blanco never told her anything about this.

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General Counsel's Exhibit 10 is an employee warning to Zaldivar dated "10/15/03." The line for "3rd WRITTEN WARNING" is checked off. Also, the line for "WORK NOT SATISFACTORY" is checked off. The "COMPANY REMARKS" read as follows: "While Mrs. Zaldivar was the assist. supervisor on 10/14/03, Mr. Solar left can opener, blender, food processor dirty as well as the counter table where these electric machines are. The cook and myself had to clean next day." The warning is signed by Blanco. The "EMPLOYEE'S REMARKS" section is blank, and the box containing "I HAVE READ AND UNDERSTAND THE CONTENTS OF THE ABOVE ACTION, EMPLOYEES SIGNATURE, [and] DATE" is blank. Zaldivar testified that Blanco never gave her this document either; and that Blanco has said Dora, look at this referring to an item which was not too clean but Blanco has never told her that she was going to write her up because of these things or showed her the warning.

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On or about October 20, 2003, Zaldivar's position was changed to dietary assistant.<sup>4</sup> When called by Counsel for General Counsel Dunwoody testified that

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in discussions with members of management, and due to several subsequent things that occurred, a decision was made to eliminate the position at Hebrew Home South Beach, because that position did not exist in any other facility, and they felt like it was out of sequence, or out of sorts with what was going on in the system. [Transcript page 31]

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When asked by Counsel for General Counsel if the reason why Zaldivar lost her position was that she was not doing any work, Dunwoody testified

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It was not productive, yes. It was not productive in many different ways. One, her supervisory skills were in question. Her loyalty to not only her supervisor, but her behavior toward her supervisor was seriously in question, in jeopardy. And there's other things that helped contribute to what are we going to do with this person and this position. It doesn't make sense. [Transcript pages 32 and 33]

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<sup>4</sup> The job description for this position was received as General Counsel's Exhibit 6.

Dunwoody further testified that Zaldivar's conduct during the grievance meeting regarding Santana, where Zaldivar did not support Blanco, was one of several things that occurred over a period of time that kept begging the question why do we have this position.

5 Blanco gave the following testimony:

JUDGE WEST: .... Now with respect to the change in positions for Mrs. Zaldivar, did that come about because you felt you could no longer work with her?

10 THE WITNESS: Right.

JUDGE WEST: So whether there was or was not a need for the position itself, that really didn't come into play. It was more the fact that you no longer felt that you could actually work with this person?

15 THE WITNESS: Right.

JUDGE WEST: That's correct?

20 THE WITNESS: That's correct. [Transcript page 237]

After Blanco testified, Respondent called Dunwoody as a witness. He testified that he became the Administrator of the involved facility about eight years ago; that he knew Zaldivar for this period; that she had various administrative and clerical duties that he did not believe were necessary; that in every facility he worked in there was a dietary manager and a dietician, with the dietician doing the clinical work and the dietary manger running the kitchen, doing the ordering, inventory, scheduling, supervision, and training, along with the dietician; that when he began working at the involved facility about eight years ago he had concerns about food costs, Zaldivar not performing kitchen duties, and the number of employee hours in the kitchen; that a decision was made by George Hernando to eliminate the position as assistant dietary supervisor; and that he recommended the elimination of the position based on Zaldivar's behavior. On cross-examination Dunwoody testified that Zaldivar was the assistant supervisor when he arrived at the facility eight years ago; that in some cases there was a part-time dietician at the other facilities where he had worked; and that shortly after he arrived at the involved facility he was concerned with food and labor costs, overstaffing, an overage of hours, and he questioned whether it was productive to have Zaldivar's position at the facility.

On rebuttal Zaldivar testified that before she was demoted to dietary aide neither Dunwoody nor Blanco complained to her about her productivity, her attitude, her trustworthiness, or the need for her position in the office; that after her demotion Dunwoody questioned her Union status in the presence of Miranda; that Dunwoody did not question her Union status any other time<sup>5</sup>; and that she never told Dunwoody that she did not trust the company and that is why she was a Union member.

45 Zaldivar testified that she lost her position as dietary assistant supervisor on October 20, 2003; that Dunwoody told her that her position was eliminated and the only thing available was dietary aide; that the next day she became a dietary aide; that there was no change in her pay or benefits but her hours changed in that as a dietary aide she worked from 5:45 a.m. to 2:15

50 <sup>5</sup> Dunwoody testified that he discussed her belonging to the Union with Zaldivar at least three or more times during the years up to October 2003.

p.m. and the days of the week she worked were rotated; that as a dietary aide she had to assemble breakfasts for the individual patients she was assigned; that while she wore a lab coat when she was the dietary assistant supervisor, as a dietary aide she wore a uniform; that after October 21, 2003 she observed Castillo doing some of the work she formerly did, namely posting menus, and giving orders to the employees; that when she was the dietary assistant supervisor, she would tell employees what to do as far as keeping the kitchen and work area clean; that after she was demoted and worked as a dietary aide, Castillo would tell her and other employees that Blanco said to do this or do that; that she did not receive any training to perform dietary aide work; that when she was the dietary assistant supervisor an employee trained a new dietary aide; that when she first became a dietary aide, some of the other employees tried to help her but Blanco told them that they could not help Zaldivar; that when she became dietary aide, Blanco would be near her all of the time and she did not see Blanco doing this with any other employee; that one time Blanco placed a thermometer in the deserts she was placing on trays and told her that the temperature of the deserts was not low enough while the temperature of the deserts Rosa Rosales was placing on the trays for the residents she was responsible for was correct; that she explained to Blanco that she and Rosales put the deserts in the refrigerator together and they took them out of the refrigerator together; that on one occasion she told a resident that the posted menu indicated that the resident would receive brisket that night, after she left the menu was changed and she was not told, and the next day Blanco reprimanded her indicating that she told the resident the wrong menu; that one time she mistakenly put two glasses of water on a resident's tray instead of one and Blanco brought this to her attention; that when she became a dietary aide Blanco called her lazy and "Jalisco" (transcript pages 86 and 87, a Mexican word for people who think they are always right), and told her that after working 20 years at the facility she did not know her job; and that when she was assistant dietary supervisor Blanco never called her names. On cross-examination Zaldivar testified that for 12 to 15 years she worked Monday through Friday, 7 a.m. to 3 p.m.; that Blanco changed her hours to 11:30 a.m. to 7:30 p.m. and when she asked Blanco about the change Blanco explained that Zaldivar had to close the kitchen and supervise the employees when Blanco was not there; and that she did not like this change.

Tabora testified that when she started out as a dietary aide Castillo trained her for about a day, teaching her how to set trays and the tablecloth, how to read the cards from the patients, and where to place the napkin and the utensils; that she and others tried to help Zaldivar perform her work when she became a dietary aide but Blanco prohibited it saying that if they helped Zaldivar, they had to help all of the other employees in the morning; and that after Zaldivar became a dietary aide, Blanco treated her badly in that Blanco would always criticize her and watch her.

Santana testified that he tried to help Zaldivar, who was not properly trained when she became a dietary aide, in that he helped her throw away the garbage; that Blanco told him that no one could help Zaldivar; that after Zaldivar started working in the kitchen he saw Castillo working extra hours after her shift helping Blanco do the inventory; and that Castillo was the one who kept the records for Blanco on the floors, setting up menus, and placing juices in the freezer.

Loechner testified that she had an opportunity to observe Zaldivar's performance during the October 2003 survey at Hebrew Home at South Beach; that the survey is an annual inspection done by the State to make sure the facility is in compliance with the State and Federal regulatory standards so that the nursing home can maintain its license and certification for Medicare and Medicaid Services; and that if the home does not pass the survey, there are monetary fines and the facility would not be allowed to accept any residents. Loechner gave the following testimony on direct:

Q. During the 2003 survey, you said you had an opportunity to observe Dora Zaldivar's work?

5 A. Un-hum

Q. What was it that you saw her do?

....

10 A. I supervised in the kitchen. I was out in the kitchen and I know one instance we - - Dora was checking the trays, that's before they go out to the residents, and there were numerous mistakes on the one tray cart regarding the consistency of the diets.

15 Q. What do you mean regarding the consistency of the diets?

A. The puree diets and the mechanical soft diets. I believe it was a puree diet had received mechanical soft meat, meaning it wasn't pureed of a mashed potato-like consistency, and they were provided with a ground consistency.

20 Q. And why is that important?

A. It could lead the resident to choke. And we would also be out of compliance.

25 Q. Did you have a discussion with Dora at that time regarding the wrong food on the wrong tray?

A. I did not speak with Dora directly, I went out - -

30 Q. What did you do?

A. I went to the kitchen and I spoke with the food service director [Blanco] and we had somebody else check the trays at that point.

35 Q. Did Dora continue to check them?

A. No.

Q. What did Dora do?

40 A. I believe she was reassigned to another position in the kitchen at that point. She wasn't checking trays though.

Q. Did she stay on the campus?

45 A. She did continue to work till the end of her shift.

Q. Did she work in an area where the survey was being conducted?

50 A. Yes.

Q. During the time that you saw what Dora was doing with respect to the trays, was

there any conversation or arguing?

A. She also got in another argument with another employee in the kitchen.

5 Q. What was the subject of that argument?

A. I believe it started with the tray accuracy and at that point, that's when I went out into the kitchen, because I knew they were arguing and I didn't think it was appropriate with the survey process.

10 ....

Q. BY MR. SCHWARTZ: Do you recall the exact date of the October 2003 survey?

15 ....

A. It was October of last year. It was between the weeks - - I can tell you the dates - - 10/27, 10/28, 10/29 and 10/30.

20 ....

A. .... And it was, I believe, one of the first days Monday, because she wasn't scheduled to work that following two days. [Transcript pages 169 – 172 and emphasis added]

25 On cross-examination Loechner testified that if she notices an employee making a mistake she does not discipline them but she corrects what they are doing and then it is up to the person in charge to do the disciplining; that she knew the trays were Zaldivar's because "I came out and checked the trays after she had checked them, because I didn't want them to go out of the kitchen if they weren't done correctly" (transcript page 182); that she did not notice any  
30 inconsistencies by other employees and she checked the tray line the following three days of the survey; and that the employee Zaldivar was arguing with during the October 2003 survey was Ligia (Castillo).

35 Zaldivar, who testified before Loechner, gave the following testimony on cross-examination:

Q. During the October 2003 survey - - do you recall the October 2003 survey?

A. More or less.

40 Q. Do you recall that you were working in the kitchen at the time?

A. Yes.

45 Q. And during that time it was your responsibility to put the food on the trays for the residents, correct?

A. Yes.

50 Q. And there are instructions as to what type of food goes to which type of resident, is that correct?

A. Right.

Q. Because you might have a particular resident who needs pureed food and one who doesn't, is that right?

A. Right.

Q. And isn't it a fact that during that survey you intentionally put the wrong food on the wrong tray for the resident?

A. No, that's not true.

Q. And isn't it true that you did that because you wanted the facility to get in trouble for it?

A. No, that's a big lie. Never I did that.

Q. And isn't it true that this happened in front of a number of witnesses?

A. That's a lie. That's not true.

Q. And if you would have put the wrong food on the wrong tray that would have been something you would have been expected to know better, correct?

....

A. Because I read the diet cards that are on the trays. That's not true.

JUDGE WEST: For the record, so it's at on place, were you the only person performing that function at that time?

THE WITNESS: If I was the only one? No.

JUDGE WEST: Were you the only person performing that task at that time?

THE WITNESS: No, we were two girls.

JUDGE WEST: Two people. Was there any specific division of work? In other words, you were doing one floor and she was doing another floor?

THE WITNESS: Yes.

JUDGE WEST: So that if the wrong meal was delivered to a floor, they would know exactly who was responsible?

THE WITNESS: Of course. If I do it in my floor, the blame would be to me.  
[Transcript pages 111 – 113 and emphasis added]

On redirect Zaldivar testified that she was never verbally reprimanded or received any kind of a write up for putting the wrong food on a resident's tray.

Dunwoody testified that Loechner told him that during the October 2003 survey she had

to relieve Zaldivar from checking trays because the trays were coming out wrong and Loechner had to personally supervise the tray line for the remainder of the survey; that the risks of having improper food on the trays include an immediate jeopardy tag from the State, a \$10,000 fine for each event for each day, a moratorium on admissions, and they could close the facility; that in most cases when a facility receives a flag, the department head that is responsible for that failure is fired, and the Administrator is fired; and that a patient would be in immediate jeopardy of either choking or dying because of what they were served. On cross-examination Dunwoody testified that the involved facility did get a tag in 2002 and he was not fired; that the tag involved air conditioning; and that no resident died during the October 2003 survey, "[n]ot that we're aware of. I believe we caught it on time." (transcript page 288)

On rebuttal Zaldivar testified that during the survey of October 2003 Loechner released her from the tray line and she believed that Castillo was brought in because Castillo was faster than she was at the time since she had just started working as a dietary aide; that she did not recall any problems with the consistency of the food; that when she was placing food on the trays Blanco told her that Castillo was going to take over with the trays; that Blanco did not give her a reason for this; and that other than an argument she had with Castillo in April 2004, she never had an argument with Castillo in the involved facility.

Blanco did not testify to corroborate Loechner's testimony that during the October 2003 survey she replaced Zaldivar on the tray line for the reason given by Loechner. And Castillo did not testify that she argued with Zaldivar during the October 2003 survey.

General Counsel's Exhibit 11 is an employee first written warning notice to Zaldivar dated "1/11/04" for "Violation of Infection Control." The "COMPANY REMARKS" section reads as follows: "Dora Zaldivar was observed removing her purse from the storage compartment where the clean and disinfected serving equipment is stored. This is a clear violation of the sanitary standards." Blanco signed the form. The following appears in the "EMPLOYEE REMARKS" section of the form: "Refused to sign." Zaldivar testified that she saw this document before and it referred to an incident when she placed her purse at the bottom of an empty counter while she used the rest room before going home; that Blanco saw the purse and gave her a written warning; that she violated company policy; that unlike other employees, she did not have a locker; and that she has seen other employees temporarily leave personal belongings on the counters but she was not sure if Blanco saw this. On cross-examination Zaldivar testified that she did not believe that she signed this warning.

As noted above, Zaldivar began filing unfair labor practice charges with the National Labor Relations Board against Respondent on January 15, 2004.

January 28, 2004 was Santana's last day of employment with the Respondent. He explained that he was injured on the job in 2002 and Blanco sent him to the hospital where it was discovered that he had a hernia. Santana testified that he then gave Blanco a paper which indicated that he should have "restrictive work" (transcript page 157); that Blanco told him that she could not give him a vacation or a day off because she had two people out; that he continued to work and Blanco did not give him the time off or "restrictive work"; that on January 28, 2004 he had an accident, Blanco wanted to give him a warning, he took the matter to the Union, Blanco insisted that he get a paper from the doctor, and then she told him that she could not have him working like that because she could have a problem; and that he pointed out to her that she had him working for over a year with the hernia and she had him helping Castillo. On cross-examination Santana testified that Blanco fired him because he had the hernia but that he was working with the hernia for some time; that the Respondent did not cooperate with his filing for Workman's Compensation; and that he has not collected unemployment.

General Counsel's Exhibit 12 is a third warning notice to Zaldivar dated "1/29/04" for "Violation of Infection Control." The "COMPANY REMARKS" section reads as follows: "After innumerable [sic] verbal warnings, Mrs. Zaldivar continues working without her hairnet on, which is a violation of infection control regulations." The form also indicates that "Employee refuses to sign." Blanco signed the form. Zaldivar testified that she did not have her hairnet on while she was washing dishes and Blanco told her that she was going to write her up; that she has seen other employees in the facility without hairnets on and to her knowledge the employees did not receive warnings for that; and that she assumed Blanco saw the other employees without hairnets because Blanco walked around in the kitchen during the day; and that this was the only warning she received for working without a hairnet on and it never happened again. On cross-examination Zaldivar testified that she did not believe that she signed this warning.

Tabora testified that she saw other employees without their hairnet on the job.

Loechner testified that one time she saw Zaldivar when her hairnet did not fully cover her hair; and that she told Blanco who spoke to the staff about the proper wearing of hairnets. On cross-examination Loechner testified that if she sees an employee not wearing their hairnet properly, she has reprimanded them.

Rosales testified that sometimes she saw Zaldivar working near food without wearing her hairnet.

Blanco testified that she reminded Zaldivar two to four times every day to put her hairnet on because "when you work with food, you [are] supposed to have your hair covered." (transcript page 220)

On rebuttal Zaldivar testified that other than this one warning for not wearing a hairnet, Blanco never warned her any other time about the hairnet.

Zaldivar testified that she did not receive General Counsel's Exhibit 17, her "9/30/03" evaluation until January 2004 during a meeting with Dunwoody, Blanco, and Miranda in Dunwoody's office; that she did not receive a copy of a written warning during this meeting but she was told that the evaluation was bad by Blanco, who gave her the evaluation; that, although it was not true, Blanco indicated that her performance and attitude were poor; and that Dunwoody handed Blanco an envelope, a warning, during this meeting, which warning indicated that some of Zaldivar's coworkers were complaining that she was leaving part of her job for them to do.

Zaldivar's employee evaluation for "9/30/03," General Counsel's Exhibit 17, contains the following in the "Remarks" section: "Mrs. Zaldivar's attitude, behavior & drive have declined drastically since the last review for no apparent reason and acts unsatisfied and argumentative." The following appears in the "Recommendation" section "Perhaps she should perform other type of work." Zaldivar's overall score on the evaluation was a "D" which equals "Poor." She received "D" in her ability to perform duties assigned, ability to accept supervision, cooperation with other staff, ability to work under pressure, general attitude, and pride in work. She received an "Excellent" rating, or an "A," in ability to work with older people, personal appearance, attendance, and on time for work. Zaldivar received a "Good" or a "B" for ability to function well in crisis, acceptance of work plan, and care and use of equipment. And she received a "Satisfactory" or a "C" in accepts responsibility and accepts and applies in-Service.



Zaldivar's prior evaluations from 1984 to 2001, which were received in evidence as General Counsel's Exhibits 16 (a) through (r), are excellent in all areas. Some also indicate "a trusted and reliable employee." On cross-examination Blanco testified that Zaldivar was an excellent employee and prior to October 2003 Zaldivar had no disciplinary warnings in her file.

Dunwoody on cross-examination testified that prior to Zaldivar's September 30, 2003 evaluation all of her evaluations had been excellent and this was her first negative evaluation "based on the record." (transcript page 289)

General Counsel's Exhibit 13 is a third warning notice to Zaldivar dated "2/17/04" for "ATTITUDE." The "COMPANY REMARKS" section reads as follows: "Employee continues to be disrespectful and argumentative when I call her attention to do anything. Or she keeps on walking and ignores whatever I am pointing out to her." The form also indicates that "Employee refuses to sign and turn [sic] her back on me." Blanco signed the form. Zaldivar testified that she did not recognize this warning; and that while Blanco was always complaining about her work she never answered Blanco but rather just did whatever Blanco told her to do.

General Counsel's Exhibit 14 is a warning notice to Zaldivar dated "4/06/04" for "WORK NOT SATISFACTORY." The "COMPANY REMARKS" section reads as follows:

Mrs. Zaldivar leaves work every day without finishing her appointed duties, for co-workers to pick-up after her. Mrs. Montesinos came into my office today and complained about how she was fed-up with Mrs. Zaldivar's disregard toward her duties. Mrs. Zaldivar is always creating discord and disruptions on procedures in order not to finish her work and creates animosity in the dept ... her co-workers scheduled.

The "ACTION TO BE TAKEN" section of the form reads as follows:

Warning given to respect her supervisor and her co-workers. Insubordination will not be tolerated. Dora needs to adjust her attitude and perform the work required as a team member. If she continues to show disrespect for her supervisor and co-workers, she will be suspended from duty for one week at the convenience of the Dept. Head. This warning will be handed to Mr. Dunwoody for recommendations on how to proceed with Mrs. Zaldivar. Then will be faxed to the Union following Mr. Hernando's order to do so with each warning with all union members.

The form is signed by Blanco, and also by Ligia Castillo, Rosa Rosales, and Celia Montesino. The "EMPLOYEE'S REMARKS" section reads as follows:

The whole situation is fabricated in order to give me sufficient warning that will result in my termination. The harassment continues since I refused to lie to support Martha Blanco in an incident that occurred with Mr. Lazaro Santana on 9/15/03.

Zaldivar testified that she received this warning from Dunwoody during a meeting with him, Miranda and Blanco in Dunwoody's office; that during the meeting she said that it was all a lie, she never left anything without finishing, and she would never leave anyone work to do for her; that she also said with respect to the signatures of the employees that Castillo is a personal friend of Blanco, and Rosa and Montesinos do not know English and the document was not translated into Spanish for them; that it is not true that (a) she leaves work every day without finishing her appointed duties for coworkers to pick up after her, and (b) she always creates discord and disruptions on procedures in order not to finish her work and creates animosity in the department; that Dunwoody told her that she had to change her attitude and Blanco said

that she was creating a bad environment in the kitchen; that two or three days before this warning she had an argument with Castillo when Castillo told her that she had to do some job that she was not supposed to do because the job was rotated and it was Castillo's turn to perform the task; that Castillo told her that she should do the job with all the money she makes and she told Castillo that it was none of her business and maybe Castillo made more money because she was Blanco's best friend and told Blanco everything that happened there, even if it was true or a lie; that she overheard Castillo tell Blanco only what she, Zaldivar, said to Castillo and Blanco said "don't worry, I'm going to take care" (transcript page 75); that before this warning Blanco never approached her to warn her about any of the items on this warning; that she never argued with any other employee at the facility; and that sometimes when she finishes her shift she asks the employees on the next shift, who will be using them, if they want the lids which cover glasses and cups.

Tabora testified that Zaldivar did not leave things laying around in the facility but rather

What happened was we work on a - - there are two tables. We have the tablecloth, we have the little covers for the glasses, the cups, the napkins and she knew that we were going to use them.

She would tell us don't leave it here. She would say here they are so you can start working so that we wouldn't have to go in the back. She would leave the things there so we wouldn't have to go in the back in the storage to get them.

It was there to make it convenient so we can distribute it. I say that - - when I - - it's my understanding when I leave things laying, when things are left laying around or when you leave things here, there, and there, but they were just left there so that we can go back and put them in place.

She would leave them on the table, the tablecloth, the covers. And she'll say I'll leave them here so you can use them. If that's called a mess, then she leave[s] a mess. [Transcript page 142]

Tabora fractured her right hand in a fall at the facility in October 2002. She returned to work in July 2003, received an injection, and continued working until December 19, 2003, when her hand and arm swelled. Her doctor gave her injections in her wrist and cervical and on December 30 referred her back to work with a light duty restriction. Blanco turned down her request for light duty, and Tabora was still on Workman's Compensation at the time of the trial herein. Consequently, Tabora's testimony quoted above refers to a period before December 19, 2003. On cross-examination Tabora testified that almost everyone left things out for the employees on the next shift and neither she nor any other employee that she was aware of received a warning for this; and that she was never told not to leave things and she was not aware that any other employee was told not to leave things around.

Castillo testified that she signed General Counsel's Exhibit 14; that she and at least one other employees told Blanco about the mess that Zaldivar left behind; that the warning was translated for her, Montesinos, and Rosales in Dunwoody's office at the same time; and that they all signed the warning at the same time, with her signing first.

Rosales testified that she signed General Counsel's Exhibit 14; that she, Castillo, and Montesinos complained about Zaldivar leaving things laying around; and that Zaldivar did less work than she did. On cross-examination Rosales testified that she cannot read English; that Blanco asked her to sign General Counsel's Exhibit 14; that she always follows Blanco's

instructions; and that Blanco translated General Counsel's Exhibit 14 for her. Rosales' affidavit to the Board, as here pertinent, reads

5 I think in April 2004 Blanco asked me to sign a letter about Zaldivar. Blanco told me that I had to sign it because of my complaint. It was written in English, but Blanco did not translate it for me and I do not know what it says. I signed it. [Transcript page 209]

10 Rosales testified further on cross-examination that she "didn't remember if it was that, the one that we signed when we were with Mr. Dunwoody. I didn't remember at that moment if it was that one." (transcript page 210); and that Blanco never asked her to sign any other complaint against Zaldivar.

15 Blanco testified that some of the employees came to her complaining that they had to do Zaldivar's work in that they had to clean up after her; and that there was a meeting with Zaldivar in Dunwoody's office regarding this matter. Subsequently Blanco testified that she translated the warning for each of the employees before they signed it.

20 By letter dated April 15, 2004, General Counsel's Exhibit 15, Dunwoody advised Zaldivar, as here pertinent, as follows:

As I mentioned in your last counseling session, you must adjust your attitude and demeanor in your work performance. It is imperative that you work as a team member and be respectful to your supervisor and your peers.

25 The employees in the Dietary Department need your cooperation and help in making sure everything runs smoothly during your tour of duty. I believe we have been patient long enough to allow you to adjust to the new job. You must show me and your supervisor that you want to continue to work here. Anything short of that and we will be forced to take immediate corrective action including suspension and possible termination.

30 As far as anything else going on, such as arbitration or appeals on your case, they may take a long time and you must prepare yourself for the eventuality that they may not turn out in your favor.

35 Your job changed, but we did not reduce your salary or pay scale in accordance with your new job duties. You are still being paid at your old rate and receiving increases along with the other bargaining unit employees.

40 Zaldivar was involved in an accident outside of work, and on or about October 28, 2004, she made a light duty request. Dunwoody testified that he denied Zaldivar's request because Respondent does not have a light duty position available, especially in the kitchen; that a couple of years ago Respondent granted light duty to an employee in Housekeeping because that employee was on Workman's Compensation, under pressure from the insurer Respondent tried to put that employee on light duty in various departments, and it was unsuccessful; that one of the departments that the employee, Maria Hernandez, worked light duty in was the Dietary Department; that nursing assistant Mireya Cabeza in 1999 had a claim that she hurt her back and the Respondent offered a light duty position for two weeks in the Nursing Department; that there have been a few other employees who worked on light duty; that a department head can recommend to him that an employee work light duty but the department head has to provide him with a list of duties and it has to be prudent and reasonable so that it does not place a hardship on the other employees; and that if he denies such a request, he discusses it with the corporate office or with his management team so ultimately it is a joint decision between him and

50 members of management.

Zaldivar testified that while she was on vacation in July 2004 she fell in the street and broke her ankle; that she was under a doctor's care; that General Counsel's Exhibit 20 is a note from her doctor, Norman Turnoff, who is an orthopedic surgeon, dated October 28, 2004, indicating that she could "return to sedentary work for 4 hours a day starting 11/3/04 (light  
 5 duty)"; that she gave a copy of the note to Blanco and left a copy on Dunwoody's desk; that Blanco looked at the note and said that there is no such thing here as light duty; that she asked Blanco to respond in writing but Blanco never did; that there is light duty work in the kitchen which she could perform sitting down, namely pouring juices in pitchers, putting glasses on trays, filling them and covering them, and placing silverware, bread and butter on the trays, and  
 10 putting desserts in bowls and covering it; that General Counsel's Exhibit 21 is a note from Doctor Turnoff, dated "11-24-04" which indicates "MAY ONLY DO LIGHT DUTY WORK UNTIL RE-EVALUATED"; that she gave the November 24, 2004 doctor's note to co-worker Mario Toro, who is a neighbor, to give to Blanco; that she has not heard from the facility since; that at the time of the trial herein she had not been released to perform her regular work; and that when  
 15 she was a dietary assistant supervisor she had about four hours of work to do each day sitting down. On cross-examination Zaldivar testified that Castillo brought a paper from her doctor regarding her back and she was on light duty, and Blanco told Santana and Toro to help Castillo do the heavier work like throwing dishes; that Castillo did not really have the paper but she had a back problem and she was on light duty; and that during the last 18 months before the trial  
 20 herein Castillo was not on light duty. On redirect Zaldivar testified that Castillo complained about back problems, Blanco told employees Santana and Toro to help Castillo, but she did not know if Castillo was on light duty because she did not know if Castillo had a document; that Santana and Toro did the heavy lifting and threw dishes through a little window.

25 Santana testified that Blanco asked him to help Castillo because she had a problem with her back and spine; that he removed racks, and took trays upstairs for Castillo; and that Blanco would instruct Castillo to take breakfast to Dr. Soto and either Blanco or Castillo, citing the instruction of Blanco, would send him.

30 Loechner testified that there is no light duty work in the involved kitchen.

Castillo testified that she has worked with back pain but it did not in any way affect her ability to do her job; that she did not have other employees assist her in performing certain functions of her job when she had back pain, she always tried to do the job herself, she wore a  
 35 girdle, and she continued to work; and that she told Blanco that her back hurt, she would take Tylenol, and she would continue working.

Dunwoody sponsored Respondent's Exhibits 1 through 12, all of which are warnings to "CNAs" (certified nursing assistants in the Nursing Department). No warnings were introduced with respect to employees who work in the Dietary Department, other than Zaldivar.<sup>6</sup> On cross-  
 40 examination Dunwoody testified that there are no warnings in Zaldivar's personnel file other than those described above.

#### Analysis

45 In his December 13, 2004 answer to the December 6, 2004 complaint, General Counsel's Exhibit 1(y), Respondent's attorney argues that "[t]he charge in case 12-CA-24055 is untimely pursuant to ... [subsection] 3-610 because the act(s) complained of took place more than 6 months before the charge was filed." The charge in case 12-CA-24055 was filed on  
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<sup>6</sup> It is noted that there was a warning to Santana which was ripped up by Miranda.

September 10. The conduct which is the subject of the September 10 charge allegedly occurred on April 6 and 15. Obviously, both of these April dates are within 6 months of September 10.

In his brief Respondent's attorney argues that

The employer's written defenses include the 6 month statute of limitations in ... [subsection] 3-610. Exhibit 1(s) [Actually, this defense was only brought up in General Counsel's Exhibit 1(y), and, as indicated above, was limited. This defense was not brought up in Respondent's November 4, 2004 Answer, General Counsel's Exhibit 1(s).].

The warning is dated 10/2/03 [General Counsel's Exhibit 7]. However, the latest consolidated complaint, GCX 1(w), is dated December 6, 2004. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, page 7]

....

This warning [General Counsel's Exhibit 9] is untimely for the same reasons as the October 8, 2003, warning. The warning is dated 10/12/03. However, the complaint, GCX 1(w), is dated December 6, 2004. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, page 11]

....

This warning [General Counsel's Exhibit 10] is untimely for the same reasons as the warnings from October 8, and 12, 2003. This warning is dated 10/15/03. However, the complaint, GCX 1(w), is dated December 6, 2004. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, pages 12 and 13]

....

This warning [General Counsel's Exhibit 11] first appeared in the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, GCX 1 Q, dated October 25, 2004. However, the warning is dated 1/12/04. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, page 13]

....

This warning [General Counsel's Exhibit 12] has not appeared in the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, GCX 1 Q, dated October 25, 2004, or any other previous complaint [The complaint refers to a written warning that was issued on or about February 2, 2004.]. Furthermore, the General Counsel did not request that this Exhibit be included, having only specified Exhibits 8, 9, 10, and 13 [General Counsel's Exhibit 12 was received in evidence at page 36 of the transcript.]. However, this warning, Exhibit 12, is dated 1/29/04. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, pages 14 and 15]

....

This warning [General Counsel's Exhibit 13] is untimely for the same reasons as the warnings from October 8, and 12, 2003. This warning is dated 10/15/03 [Actually, this warning is dated "2/17/04."]. However, the complaint, GCX 1(w), is dated December 6, 2004. Therefore any action by the General Counsel on this warning is untimely.

[Respondent's brief, pages 15 and 16]

...

5           Action on the letter [General Counsel's Exhibit 15] is untimely. This letter is dated April 15, 2004. However allegations relating to this letter first appeared in the complaint, GCX 1(q), dated October 25, 2004. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, page 18]

10           ....

15           Action on the Evaluation [General Counsel's Exhibit 17] is untimely. The Evaluation is dated September 30, 2003. However allegations relating to the Evaluation first appeared in the complaint, GCX 1(g), dated August 26, 2004. Therefore any action by the General Counsel on this warning is untimely. [Respondent's brief, page 18]

The assertions of Respondent's attorney on brief demonstrate a basic misunderstanding of the involved section of the Act. As here pertinent, Section 10(b) of the Act indicates as follows:

20

25           Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board ... shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect ... *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made .... [Emphasis added.]

30

35           On brief the Respondent's attorney focuses on the dates of the complaints in this proceeding while the Act refers to the timing of the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. In its answers, Respondent admits the filing dates of the involved charges and the fact that they were served on Respondent in a timely manner. None of the above-described arguments of the Respondent concerning Section 10(b) of the Act have any merit. Indeed, to argue a failure to meet the requirements of Section 10(b) of the Act one must allege it in its answer. As noted above, the only Section 10(b) argument that was made in Respondent's answers herein was made in its December 13, 2004 answer, General Counsel's Exhibit 1(y), and that argument was limited, and as found above, it was obviously mistaken. Section 10(b) of the Act is not jurisdictional. It is an affirmative defense and, if not timely raised, it is waived. *Public Service Co.*, 312 NLRB 459, 461 (1993) and *DTR Industries*, 311 NLRB 833, 833 fn. 1 (1993), enf. denied 39 F. 3d 106 (6th Cir. 1994) (waived when not pleaded as an affirmative defense in the answer or litigated, even though raised in the brief to the judge). Since the Respondent did not even raise a Section 10(b) defense, except its limited and obviously mistaken one in its December 13, 2004 answer, until after the trial herein closed, such defense, in addition to having no merit, is itself untimely.

45

As noted above, the parties stipulated, as here pertinent, that just before the alleged unlawful conduct began Zaldivar was a Section 2(11) supervisor under the Act.

As pointed out by the Board in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 402-404 (1982)

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Notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge [or, as in the case at hand, the demotion] of a supervisor may violate

Section 8(a)(1) [of the Act] in certain circumstances .... Thus, an employer may not discharge [or demote] a supervisor for giving testimony adverse to an employer's interest ... during the processing of an employee's grievance under the collective bargaining agreement. .... [T]he protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their Section 7 rights.

....

... the justification for finding a violation and reinstating a supervisor who would otherwise be excluded from coverage under the Act is grounded upon the view that the discharge itself severely impinged on the employees' Section 7 rights. As noted above, the Board has found that, when a supervisor is discharged [or, as here, demoted] for testifying at a ... contractual grievance procedure ... the impact of the discharge [or, as here, demotion] itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in ... grievance procedures, compels that they be protected despite the general statutory exclusion. [Footnotes omitted.]

The Board's conclusions were upheld upon judicial review. As pointed out by Judge Mikva in *Food & Commercial Workers Union Local 1095 v. NLRB*, 711 F. 2d 383, 386 and 387 (D.C. Cir. 1983)

Under the Act, supervisors are explicitly excluded from the definition of 'employee.' 29 U.S.C. subsection 152(3) (1976). As the Supreme Court has recognized, this fact entitles an employer to insist on the loyalty of his supervisors and means that a supervisor is not free to engage in activity which, if engaged in by a rank-and-file employee would be protected. .... There are three basic exceptions to this rule, however, in which an employer's conduct towards a supervisor has been found to violate section 8(a)(1) of the Act: 1) where a supervisor is disciplined for testifying ... during the processing of an employee's grievance ....

There is no question but that reinstatement was the appropriate remedy in each of these cases for the harm done to the rank-and-file employees. [Citations omitted and emphasis added.]

The meeting in Blanco's office over Santana's grievance was a grievance meeting pursuant to the involved collective bargaining agreement. Blanco did not refuse to hold the grievance meeting in her office. Blanco herself got Santana's warning out of her desk and gave it to Miranda. And according to Santana and Zaldivar, Blanco had Zaldivar and Tabora come to the office. As noted above, Dunwoody initially took the position that the grievance meeting "didn't happen ... because it's not official" if he was not there. But then Dunwoody testified that if Blanco and Zaldivar were having a disagreement during the grievance meeting they should have exited it, had a caucus and "maybe get me involved ...." (emphasis added) And when called by the Respondent, while Dunwoody originally testified that it was "totally unprecedented for the Union representative to come into the facility and meet with the department head without me being present," he later testified that it has happened a couple of times. In other words, contrary to Dunwoody's original testimony, it is not unprecedented. As noted above, the grievance procedure is set forth in the collective bargaining agreement. As indicated in Article 19, step 1 indicates "... a grievance shall be taken up between the grievant and/or his/her Union representative and his/her immediate supervisor." There is no mention of a requirement that the Administrator be present at step 1. Step 2 indicates that if the Union is not satisfied with the step

1 outcome it shall "present the written grievance to the Administrator...." Here the grievance procedure did not go beyond step 1. Consequently, under the collective bargaining agreement there was no need to involve the Administrator. Contrary to the testimony of Blanco, Zaldivar did not sign Santana's warning. Indeed, Zaldivar put Blanco on notice that she did not support what  
 5 Blanco was doing before Zaldivar was called as a witness at the Santana grievance meeting. The situation at hand falls squarely under the above-quoted language of *Parker-Robb Chevrolet, Inc.*, supra, Blanco did not specifically deny Santana's testimony that he told her that what she did to Zaldivar, demoting her from her position as assistant supervisor, was an injustice. The employee was putting Blanco on notice that he was aware why Zaldivar was  
 10 demoted. Tabora was also aware. Zaldivar's demotion impacted the employees' Section 7 rights. As pointed out in *Parker-Robb Chevrolet, Inc.*, supra, this "coupled with the need to ensure that even statutorily excluded individuals may not be discouraged from participating in ... grievance procedures, compels that they be protected despite the general statutory exclusion."

15 Before the involved Santana grievance meeting, Zaldivar had worked for Respondent for almost 20 years. By all accounts, during that period she was an excellent employee. Up to that point, all of her evaluations were excellent, she had no disciplinary warnings, and she was made a supervisor in 1996. But from Respondent's point of view, Zaldivar made a major mistake. She did not support the position her manager, Blanco, took regarding the Santana grievance in  
 20 September 2003. As Dunwoody testified, it was his understanding that Zaldivar had embarrassed Blanco, Blanco felt that Zaldivar was disloyal and had not supported her, and Blanco felt like she was made to look like a fool in front of the Union representative. While Blanco originally testified that she was not upset by Zaldivar's failure to support her at the meeting with Miranda, Blanco subsequently testified that because of what Zaldivar had done,  
 25 she could no longer work with her.

None of the Respondent's witnesses are credible. The Respondent has taken a position and just as Blanco and Dunwoody expected Zaldivar to support Blanco's warning to Santana, whether or not it was truthful or just, so too here Blanco and Dunwoody undoubtedly expected  
 30 the Respondent's witnesses to support the Respondent's position whether it is truthful or just. One could appreciate Blanco and Dunwoody's expectations in the light of the circumstances extant here. After all Zaldivar, an excellent employee and supervisor, is an example of what can occur if someone does not support the company position. But in this proceeding we are not interested in who supports whom but rather who is telling the truth under oath. All of the  
 35 Respondent's witnesses lied under oath.

Dunwoody testified that the Santana grievance meeting was not a grievance because he was not present and it is positively out of the ordinary and totally unprecedented for the Union representative to come into the facility and meet with the department head without him being  
 40 present. Then Dunwoody testified that it has happened a couple of times. So it is not unprecedented. As noted above, there is no requirement that he be present at a step 1 grievance meeting. But Dunwoody was trying to undermine the fact that what occurred was a grievance meeting and so he testified accordingly. Also, Dunwoody wanted to convey the impression that Zaldivar's demotion was not due to the fact that she told the truth during the  
 45 Santana grievance meeting and did not support Blanco. According to Dunwoody it was something that he had been thinking about for some time, namely about eight years for a number of reasons described above. But Blanco undermined Dunwoody's testimony when she testified that Zaldivar's demotion came about because she felt that she could no longer work with Zaldivar, and whether there was a need for an assistant supervisor in the Dietary  
 50 Department did not come into play; it was more the fact that she no longer felt that she could work with Zaldivar. And finally Dunwoody testified in support of Loechner's ill-advised attempt to impeach Zaldivar's credibility with her fabricated testimony about what occurred during the



October 2003 survey, which matter will be treated below.

Blanco intentionally attempted to mislead regarding what was said at Santana's grievance meeting. Contrary to the testimony of Blanco, both Tabora and Zaldivar, when called as witnesses during the grievance meeting, contradicted Blanco's statement that Tabora told Blanco that the trays had not been washed the day before Tabora tried to use them. Zaldivar did not say that she did not know anything about it during the grievance meeting. And contrary to the testimony of Blanco, Zaldivar did not sign the warning. While Blanco testified that Zaldivar did sign the warning, Blanco did not take the stand on surrebuttal and specifically deny Zaldivar's rebuttal testimony that when she returned to work on Tuesday, her first work day after giving Santana the warning on Saturday, Blanco asked her why she did not sign the warning and Zaldivar told her that she did not agree with the warning. Blanco also lied when she testified that she was not upset by Zaldivar's failure to support her during the grievance meeting. Dunwoody testified that it was his understanding that Zaldivar had embarrassed Blanco, Blanco felt that Zaldivar was disloyal and had not supported her, and Blanco felt like she was made to look like a fool in front of the Union representative. Dunwoody did not testify that Blanco was merely surprised that Zaldivar said that she did not know anything about it. Blanco told Dunwoody what happened and when he repeated it under oath he contradicted Blanco's testimony at the trial herein. As Zaldivar, Tabora, and Santana testified, Blanco became angry, and upset at the Santana grievance meeting. Initially Blanco would not admit this but subsequently she conceded that she could no longer work with Zaldivar. Also Blanco fabricated some of the above-described warnings which were received in evidence at the trial herein. For example, as noted above, the "10/2/03" warning reads, as here pertinent "Zaldivar ... search[ed] into confidential payroll records which were not at anyone[s] disposal ...." Yet Blanco did not specifically deny Zaldivar's testimony that while doing a part of her job and going through employee records to make sure they were up to date with respect to health certificates, and permits she found the document in question in Castillo's file that she was reviewing; that normally Zaldivar prepares the form for an employee to receive a pay increase and Blanco signs the form but Zaldivar had never seen Castillo's form before and Blanco had prepared it; and that Zaldivar had never been told that there were some documents that she did not have access to. In other words, contrary to the language Blanco used in the warning, as a part of her job Zaldivar usually prepared this kind of document for Blanco's signature and it was at Zaldivar's "disposal." And finally, Blanco's testimony that she translated the April 6 Zaldivar warning for "each" of the employees who signed it is contradicted by the affidavit of Rosales. Blanco was not a credible witness.

The evidence of record leads inescapably to the conclusion that the testimony of Loechner with respect to what occurred during the October 2003 survey, namely that Zaldivar had the wrong food on a tray, is an ill-advised total fabrication in an attempt to undermine Zaldivar's credibility. Respondent's attorney set the stage during his cross examination of Zaldivar with the following:

Q. And isn't it a fact that during that survey you intentionally put the wrong food on the wrong tray for the resident?

A. No, that's not true.

Q. And isn't it true that you did that because you wanted the facility to get in trouble for it?

A. No, that's a big lie. Never I did that.

Later he called Loechner who testified as follows:

Q. During the 2003 survey, you said you had an opportunity to observe Dora Zaldivar's work?

A. Un-hum

Q. What was it that you saw her do?

....

A. I supervised in the kitchen. I was out in the kitchen and I know one instance we - - Dora was checking the trays, that's before they go out to the residents, and there were numerous mistakes on the one tray cart regarding the consistency of the diets.

Q. What do you mean regarding the consistency of the diets?

A. The puree diets and the mechanical soft diets. I believe it was a puree diet had received mechanical soft meat, meaning it wasn't pureed of a mashed like-like consistency, and they were provided with a ground consistency.

Q. And why is that important?

A. It could lead the resident to choke. And we would also be out of compliance.

Q. Did you have a discussion with Dora at that time regarding the wrong food on the wrong tray?

A. I did not speak with Dora directly, I went out - -

Q. What did you do?

A. I went to the kitchen and I spoke with the food service director [Blanco] and we had someone else check the trays at that point. [Emphasis added.]

Blanco did not testify that Loechner told her about this situation and she spoke to Zaldivar about it. As noted above, Blanco orally reprimanded Zaldivar for putting two glasses of water on a tray, she orally reprimanded Zaldivar (Blanco did not specifically deny Zaldivar's testimony that this was a false accusation.) for jello not being cool enough, and she orally reprimanded Zaldivar for giving a resident the wrong information about a menu which had been subsequently changed unbeknownst to Zaldivar. If Zaldivar did something which could have resulted in a resident choking so that the facility would get in trouble for it, Blanco would have said something to Zaldivar and Zaldivar would have received some kind of discipline. She did not. While Loechner testified that she has reprimanded an employee for not wearing a hair net properly, she said nothing to Zaldivar about this alleged attempt to choke a resident to get Respondent in trouble. Blanco did not refute Zaldivar's testimony that when Blanco took her off the checking trays she did not explain why. Loechner's testimony about what occurred with Zaldivar during the October 2003 survey is a fabrication. She is not a credible witness and her testimony about Zaldivar's performance at the North Dade facility and about not wearing a hair net properly is not credited.

Castillo testified that the April 6 warning to Zaldivar was translated for her, Montesinos, and Rosales in Dunwoody's office at the same time. According to Rosales' affidavit "Blanco did

not translate it [the April 6 Zaldivar warning] for me and I don't know what it says. I signed it." (transcript page 209) Additionally, neither Castillo nor Blanco denied Zaldivar's testimony that just before this warning Blanco told Castillo, who was complaining about what Zaldivar said during their verbal exchange, "don't worry, I'm going to take care." Blanco did not deny

5 Santana's testimony that she told him to help Castillo because she had a problem with her back and spine. Santana's testimony is credited. While Castillo admitted that she had back pain and she told Blanco about it, she testified that she did not have other employees assist her in performing certain functions of her job. Castillo is not a credible witness.

10 Rosales could not even admit the obvious. Instead of conceding what her affidavit indicated, Rosales tried to dismiss it taking the position that she didn't remember if it was "the one that we signed when we were with Mr. Dunwoody. I didn't remember at that moment if it was that one," (transcript page 210) only to have to testify on further cross-examination that Blanco never asked her to sign any other complaint against Zaldivar. Blanco is not a credible witness. Castillo is not a credible witness. Rosales is not a credible witness. It appears that  
15 Zaldivar fully appreciated the situation at the time when she wrote on her April 6 warning "The whole situation is fabricated in order to give me sufficient warning that will result in my termination. The harassment continues since I refused to lie to support Martha Blanco in an incident that occurred with Mr. Lazaro Santana on 9/15/03."

20 With respect to the specific allegations in the complaint, paragraph 5(a) of the complaint alleges that on or about October 8, 10, 12, and 15, 2003, in or about mid-January 2004, and on or about February 2 and 17 Respondent unlawfully issued Zaldivar written warnings.

25 Regarding the October 2, 2003 written warning (referred to in the complaint as on or about October 8, 2003), Counsel for General Counsel contends on brief that employees discussed their wages openly as confirmed by the fact that Castillo testified that she requested a raise from Blanco because she had heard that other employees had received raises; and that Blanco seized upon the incident to issue Zaldivar a written warning in retaliation for Zaldivar's  
30 failure to support Blanco during the Santana grievance hearing. Respondent on brief argues that General Counsel failed to make a prima facie case because she failed to prove protected activity and a direct connection to protected employees; and that Respondent proved the warning was well deserved. As noted above, Blanco is not a credible witness. Two people testified about this conversation between Blanco and Zaldivar. Zaldivar's testimony is credited.  
35 As part of her job she came across the document in issue.<sup>7</sup> Zaldivar normally filled out such documents. She discussed it with Blanco. The discussion rose above a conversational tone. The document was returned to the file. No copies were made. What occurred next was punishment for Zaldivar's failure to support Blanco during the Santana grievance hearing. For the reasons given above, the content of the warning is false. Also false is Blanco's notation  
40 "Refused to sign." Zaldivar's testimony that Blanco did not give her this warning is credited. Respondent violated the Act as alleged in paragraph 5(a) of the complaint with this document.

45 With respect to the October 10, 2003 warning, Counsel for General Counsel contends that if Zaldivar had engaged in the conduct described in this warning, Blanco would have written about the insubordinate behavior and being called a liar in the first warning, the October 2, 2003 warning, about this incident; and that Blanco issued the warning solely because Zaldivar failed

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50 <sup>7</sup> Zaldivar testified that the document referred to a June raise to Castillo. Obviously it had to refer to a June 2003 raise to Castillo since Zaldivar's conversation with Blanco occurred in October 2003. And when Castillo testified that she received a raise six months before the trial herein she obviously was referring to a June 2004 raise.

to support her during the grievance meeting, and in order to paper Zaldivar's file with her disciplines in order to ultimately get rid of Zaldivar either through resignation or discharge. Respondent on brief argues that it is totally illogical that Respondent would first terminate the position, only to offer Zaldivar another one, and then fabricate a series of warnings to justify terminating Zaldivar; that Zaldivar deserved the warning; and that the evidence shows that other employees that behaved similarly received similar or even more severe discipline. Blanco never explained why she apparently waited eight days to write this second warning about the incident originally covered in the October 2, 2003 warning, if she did wait eight days. The date on the top of the warning is a "write over." That is, someone wrote over the original day and then wrote over the month, not changing the month but apparently changing the day. I agree with Counsel for General Counsel that if an employee is insubordinate and calls her manager a liar, one would expect that this would appear in the original warning covering the incident. It did not. Again the content of the warning is false. Blanco is not a credible witness. Dunwoody was not present, and Dunwoody is not a credible witness. At least here Blanco did not write "Refused to sign." Zaldivar's testimony that she never saw this warning before is credited. Also, Zaldivar's testimony about what occurred during her involved conversation with Blanco is credited. Since Zaldivar did not engage in the conduct described in this warning, there is no need to refer to other disciplines introduced by the Respondent. With respect to another of Respondent's arguments, contrary to the position that Respondent takes, this warning is dated before Zaldivar's position was terminated and not after. Respondent's fabrication began before the position was terminated with this warning and the October 2, 2003 warning, and, as will be seen below, the fabrication continued after this. Respondent violated the Act as alleged in paragraph 5(a) of the complaint with this document.

With respect to the October 12 and 15, 2003 warnings, Counsel for General Counsel contends that Zaldivar credibly testified that she was unaware of the warnings and neither have her signature; that these warnings do not state "Refused to sign"; and that these warnings were prepared as an ex post facto attempt to support Respondent's violative conduct. Respondent on brief argues that there is a surprising amount of factual detail in the October 12, 2003 warning if it is a fabrication; and that with respect to the October 15, 2003 warning, although Zaldivar testified that she was not told she would be written up, she never said it wasn't true. Both of these warnings are fabrications. The date on General Counsel's Exhibit 9, the warning that is now dated "10/12/03," is a write over. Both are checked for "3rd WRITTEN WARNING" although they allegedly were drafted three days apart. Zaldivar was not given these warnings. She was not told about them. She did not sign them. Blanco did not indicate "Refused to sign" on either of them. The fact that Blanco on one occasion pointed out to Zaldivar an item that was not too clean does not mean that these two warnings were warranted. If they were, one would expect that they would have been discussed, shown to Zaldivar, and signed to show that they were received by Zaldivar. They were not. Both are fabrications. With these two documents, Respondent violated the Act as alleged in paragraph 5(a) of the complaint.

Regarding the January 11 written warning, Counsel for General Counsel contends on brief that while Zaldivar admits that it was against company policy to leave her purse in that area for infection control purposes, she had no designated area to place her personal belongings because unlike the other assistants, she was not assigned a locker; that Zaldivar, as corroborated by Tabora, credibly testified without dispute that she observed other dietary assistants leaving purses and sweaters on countertops, and had never observed employees receiving warnings for this; that Respondent did not present any evidence that other employees were disciplined for this; and that Blanco disparately treated Zaldivar and continued to retaliate against her. Respondent on brief argues that Zaldivar admitted on cross-examination that the warning was justified; that Zaldivar only assumed that Blanco saw other dietary assistants leave their personal belongings on the counter; and that the evidence does not show that there was

an improper motive. This incident occurred after Zaldivar was demoted but in the circumstances, it did not matter whether Zaldivar was a supervisor or dietary assistant. As concluded below, after demoting Zaldivar, Blanco engaged in a campaign of harassing and/or closely monitoring Zaldivar. Nonetheless, Zaldivar admittedly violated company policy. Zaldivar admits that she saw this warning before the trial herein. While Zaldivar testified that she has seen other employees temporarily leave personal belongings on the counters, she was not sure if Blanco saw this.<sup>8</sup> Accordingly, it cannot be concluded that Zaldivar was treated disparately. The burden of proof regarding a showing of disparate treatment is on General Counsel. Respondent does not have to show that other employees were disciplined for this unless and until General Counsel can show that other employees engaged in this conduct in the presence of a supervisor. Such a showing has not been made. With respect to General Counsel's contention that Zaldivar had no designated area to place her personal belongings because unlike other assistants, she was not assigned a locker, it is noted that Zaldivar testified that "I was getting ready to leave and I went to the bathroom and put my purse at the bottom of the counter." (transcript page 69) To me this means that Zaldivar was getting ready to leave work for the day and before leaving she used the restroom, placing her purse at the bottom of a counter. To me this means that her purse was somewhere else before she started leaving work and used the restroom. Apparently as a matter of convenience, she collected her personal belongings before she used the restroom instead of using the restroom before collecting her personal belongings from where she left them during the work day. While it is clear that Blanco had been punishing Zaldivar for making a truthful, favorable statement in favor of an employee during a grievance meeting, this alone would not warrant a finding that this warning is unlawful since the conduct was an admitted violation of policy - a business justification for the warning - and it has not been shown that another employee engaged in the same conduct in the presence of a supervisor and was not disciplined. While Respondent may have had a mixed motive for this discipline, without knowing whether it ever had the opportunity to discipline an employee for this infraction before, one has to accept the situation at face value; Zaldivar admittedly violated a company policy. It has not been shown that the Respondent violated the Act with this warning.

With respect to the January 29, 2004 warning (The complaint refers to a written warning that was issued on or about February 2, 2004.), Counsel for General Counsel contends that Zaldivar, as corroborated by Tabora, observed other employees not wearing their hairnets in the facility and did not know of others who received written discipline; that Loechner testified on cross-examination that she has verbally reprimanded other employees for not wearing a hairnet, yet Respondent did not present any written warnings for same; and that the evidence reflects that Blanco once again disparately treated Zaldivar and continued to retaliate against her. Respondent on brief argues that Zaldivar admittedly violated the hairnet requirement. Tabora testified "[y]es" to the question "[d]id you ever observe other employees without their hairnet on the job." (transcript page 141) Tabora did not testify as to exactly where these other employees were on the job or what those employees were doing when they were not wearing their hairnet. Tabora did not testify that these other employees who were not wearing their hairnets were in an area where they should have been wearing their hairnets or were performing a function which required the wearing of a hairnet, they were seen by a supervisor, and they were not disciplined. Loechner, who is not a credible witness, testified that she has reprimanded employees for not wearing their hairnet properly. This could mean that she verbally reprimands them and there is no written record. Also, not wearing their hairnet properly may mean that the

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<sup>8</sup> Tabora testified "[y]es" to the question "[d]id you ever observe ... purses or other personal belongings outside of those lockers." (transcript page 141) Tabora did not testify that she saw the personal belongings in an infection controlled area and she did not testify that this occurred in the presence of a supervisor.

hairnet, as worn, does not fully cover the employee's hair. This is not the same as not wearing a hairnet at all, which was the situation with Zaldivar when she received the written warning. Whereas Zaldivar admitted violating company policy with respect to her purse, with respect to her hairnet she testified that she was washing dishes. It is not clear whether Zaldivar was  
 5 cleaning and rinsing dishes in preparation to placing them in a dishwasher or whether the washing she was manually doing was the only washing the dishes would receive before they were used again to transport food to the residents. Also, no knowledgeable witness testified with respect to the applicable hairnet requirements in the situation at hand.<sup>9</sup> While Zaldivar testified that she had seen other employees in the facility without hairnets and to her knowledge they did  
 10 not receive warnings, she did not testify that they were in an area where or performing a function which requires that they should be wearing hairnets, and this occurred in the presence of a supervisor. Has Counsel for General Counsel shown that Zaldivar was treated disparately? Counsel for General Counsel has shown that Blanco had been continually punishing Zaldivar for not supporting Blanco during the Santana grievance meeting. Here Blanco incredibly testified  
 15 that she reminded Zaldivar two to four times every day to put her hair net on. Zaldivar's testimony that other than this one warning for not wearing a hairnet, Blanco never warned her any other time about the hairnet is credited. So to the extent that the warning refers to "innumerable verbal warnings" it is fabricated. In these circumstances Respondent should have shown that it had a business justification for issuing this written warning. The warning does not  
 20 specify exactly what Zaldivar was doing when she should have been wearing her hairnet. And Blanco did not testify about exactly what Zaldivar was doing when she should have been wearing her hairnet. Respondent should have called a credible, knowledgeable witness to testify

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<sup>9</sup> Just before resting Respondent attempted to introduce a document titled Food Code, U.S. Public Health Service, FDA, 2001, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Public Health Service – Food and Drug Administration, Washington, DC 20204. The document included a cover page and pages 35 and 36 which refer to "Hair Restraints." He did not have a sponsoring witness and requested judicial notice. Counsel for General Counsel objected. Dunwoody, who was at counsel table, was asked to take the stand but he knew nothing about  
 30 the document other than the fact that Loechner gave it to him. Loechner was not called to testify about the document. The objection was sustained and the document, Respondent's Exhibit 13, was placed in the rejected exhibit file. Respondent's brief has two attachments. The first is a three page document titled FLORIDA ADMINISTRATIVE CODE ANNOTATED, TITLE 05. DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, SUBTITLE 5K. DIVISION  
 35 OF FOOD SAFETY CHAPTER 5K-4. FOOD. The following appears on page 2 of this document:

(4) Food Code - - Provisions Adopted.

(a) Chapters 1 - -7 of the "2001 Food Code" and Chapters 1 - - 7 of the "Supplement to the 2001 Food Code," published by the U.S. Public Health Service of the U.S. Department of Health and Human Services, are hereby adopted by reference as administrative rules under Chapter 500, F.S., except for the following .... [Which exceptions are not here pertinent.]

The second document is the FDA FOOD CODE. As here pertinent, Chapter 2 of this document contains the following:

Hair Restraints

2-402.11 Effectiveness.

(A) ... FOOD EMPLOYEES shall wear hair restraints such as hats, hair coverings or nets, beard restrains, and clothing that covers body hair, that are designed and worn to effectively keep their hair from contacting exposed FOOD; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLE-SERVICE and SINGLE-USE  
 50 ARTICLES.

as to whether or not a person washing (Was she scraping and rinsing? Is the nursing home required to use a dishwasher to adequately sanitize the dishes?) dishes in a Florida nursing home, which may or may not have subsequently gone into a dishwasher, is required to wear a hairnet while performing this task. I do not believe that Respondent has shown that it had a business justification for this warning or that Zaldivar would have received it absent her truthful, favorable statements regarding an employee during a grievance meeting. Respondent violated the Act as alleged in paragraph 5(a) of the complaint with this document.

Regarding the February 17, 2004 warning, Counsel for General Counsel contends that Zaldivar denied ever receiving this warning for disrespectful, and argumentative behavior, and Zaldivar testified that she always followed Blanco's instructions; that Blanco did not testify about Zaldivar's alleged conduct, nor did Respondent present any other witnesses to support this warning; and that the evidence reflects that this warning was placed in Zaldivar's file in an attempt to support Respondent's other violative conduct to paper her file in violation of Section 8(a)(1) of the Act. Respondent on brief argues that General Counsel bears the burden of proving a negative, namely, as here pertinent, that Zaldivar was not insubordinate; and that Respondent through Blanco and Dunwoody proved that Zaldivar was disrespectful and insubordinate. Shortly after Zaldivar did not support Blanco at the Santana grievance meeting, Respondent initiated a continuing campaign of punishing Zaldivar. Zaldivar did not sign this warning, and she testified that she did not recognize it and she never answered Blanco but rather did whatever Blanco told her to do. Zaldivar's testimony is credited. Blanco did not testify about the specifics of this warning. Neither Blanco nor Dunwoody are credible witnesses. Respondent has not shown that it had a business justification for the issuance of this warning. Respondent violated the Act as alleged in paragraph 5(a) of the complaint with this document.

Paragraph 5(b) of the complaint alleges that on or about October 8, 2003, Respondent issued Zaldivar a negative performance evaluation. Counsel for General Counsel contends on brief that after the Santana grievance meeting Blanco hardly spoke to Zaldivar and stopped communicating with her regarding the issues in the dietary department; that Zaldivar was forced to ask others for the information she previously obtained from Blanco; that Blanco started performing some of Zaldivar's prior duties, without notifying Zaldivar; that Blanco went to a seminar by herself to which Zaldivar had accompanied Blanco for the past 10 years; that Respondent did not explain why it did not give Zaldivar her September 30, 2003 evaluation until January 2004; and that Respondent admitted that this was the first negative evaluation Zaldivar received during her seven-year tenure with the Respondent as dietary assistant supervisor. Respondent on brief argues that there is no evidence besides the circumstantial timing of the evaluation to connect it to the grievance encounter; and that Counsel for General Counsel never asked Blanco whether Zaldivar received a bad review. It has been demonstrated that Zaldivar did not support Blanco during the Santana grievance meeting and that Respondent then initiated a campaign of unlawful retaliation against Zaldivar, which included Blanco no longer meaningfully communicating with Zaldivar so that she could do her job properly, Respondent fabricating warnings against Zaldivar, and Respondent unlawfully demoting Zaldivar. In other words, a prima facie case of unlawful discharge has been made. Has the Respondent shown that it had a business justification for the poor September 30, 2003 evaluation? As will be discussed below, Respondent engaged in a campaign of harassment. Respondent might argue that the retaliation and harassment occurred chronologically after the September 30, 2003 evaluation. Interestingly Dunwoody did not specifically cite the September 30, 2003 evaluation and go into the specifics of it in justifying Zaldivar's October 20, 2003 demotion either to Zaldivar at the time or on the record at the trial herein. I suspect that is because the September 30, 2003 evaluation was not in existence when Zaldivar was demoted on October 20, 2003. I suspect that again Respondent fabricated, sometime between October 20, 2003 and January 2004, a document to add to those which it was using to justify what it was doing to Zaldivar. As Counsel

for General Counsel points out, Respondent did not explain on the record herein why it did not give this evaluation to Zaldivar until January 2004. And Blanco did not cite the September 30, 2003 evaluation for the demotion of Zaldivar. Indeed, as noted above, Blanco eventually conceded that Zaldivar was demoted because for the most part Blanco felt that she could no longer work with Zaldivar because Zaldivar did not support Blanco at the Santana grievance meeting. Respondent has not shown that absent Zaldivar failure to support Blanco at the Santana grievance meeting that Respondent would have given Zaldivar the poor evaluation dated September 30, 2003. Respondent violated the Act as alleged in paragraph 5(b) of the complaint.

Paragraph 5(c) of the complaint alleges that on or about October 20, 2003, Respondent demoted Zaldivar from dietary assistant supervisor to dietary assistant. Counsel for General Counsel contends on brief that an employer's conduct against a statutory supervisor violates the Act if the conduct interferes with the exercise of Section 7 rights of employees, *Parker-Robb Chevrolet, Inc.*, supra; that an employer cannot discipline a supervisor because the supervisor provided a truthful statement unfavorable to the employer during contract grievance procedures held under the parties' collective-bargaining agreement, *Rohr Industries, Inc.*, 220 NLRB 1029 (1975); that while Blanco testified that she received no notice from Miranda regarding the meeting, she did not refuse to hold the meeting; that the failure of the Respondent to put another warning in Santana's file suggests that Respondent agreed that Santana should not have received the warning in the first place; and that by demoting Zaldivar Respondent sent a message to employees that they were not allowed to have a fair grievance proceeding if a supervisor's truthful statement at the grievance proceeding is contrary to the position taken by the Respondent because that supervisor would be disciplined by the Respondent. Respondent on brief argues that the only evidence offered by General Counsel is circumstantial evidence based on the timing of the elimination of the position; and that the timing of the events alone is too slender a reed on which to support a finding of causation.<sup>10</sup> In addition to the timing, there is the following testimony of Blanco:

JUDGE WEST: .... Now with respect to the change in positions for Mrs. Zaldivar, did that come about because you felt you could no longer work with her?

THE WITNESS: Right.

JUDGE WEST: So whether there was or was not a need for the position itself, that really didn't come into play. It was more the fact that you no longer felt that you could actually work with this person?

THE WITNESS: Right.

JUDGE WEST: That's correct?

THE WITNESS: That's correct. [Transcript page 237]

This means that if one were to accept the testimony of Dunwoody that for about eight years he

<sup>10</sup> Respondent also suggests that the fact that Miranda tore up Santana's warning - a business record of the employer - was a destruction of evidence, it should be chargeable against Zaldivar, and she should lose the protection of the Act. While this argument shows some imagination, it lacks any merit. Blanco needlessly created the situation. The only thing Zaldivar did was to tell the truth. Zaldivar did not lose the protection of the Act.



was thinking about abolishing the assistant supervisor's position and that is the primary reason that Zaldivar finally lost the position, Blanco did not agree with Dunwoody. Blanco would be the one to know the real reason. Additionally, Dunwoody's rational spoke to a situation where there is a dietary manager and a dietician. On cross-examination Dunwoody pointed out that in some of the cases there was a part-time dietician at the other facilities where he worked. At the involved facility the dietician is a consulting dietician who generally works only 24 hours, or the equivalent of a total of 3 work days, a month. Blanco did not deny that after Zaldivar was demoted, Castillo started performing the functions that Zaldivar performed as a dietary assistant supervisor. In other words, while Zaldivar was taken out of the position, the work that was formerly done by Zaldivar was not eliminated. After Zaldivar gave a truthful, favorable statement regarding an employee during a grievance meeting, Respondent initiated a campaign of unlawful retaliation and harassment against Zaldivar. The demotion was one of the steps taken against Zaldivar because she told the truth at the Santana grievance meeting. Employees were aware of what was happening. For the reasons given by Counsel for General Counsel, Respondent violated the Act as alleged in paragraph 5(c) of the complaint.

Paragraph 5(d) of the complaint alleges that since on or about October 20, 2003, Respondent, by Martha Blanco, has been harassing Charging Party Zaldivar and/or closely monitoring Charging Party Zaldivar's work. Counsel for General Counsel contends on brief that after Zaldivar became a dietary assistant Blanco closely monitored Zaldivar's work, reprimanded Zaldivar constantly, and called Zaldivar names; that Tabora corroborated Zaldivar's testimony stating that Blanco treated Zaldivar poorly, frequently reprimanding Zaldivar, finding defects in Zaldivar's work, and always watching Zaldivar; and that Blanco did not dispute Zaldivar's testimony about Blanco accusing her of not having deserts at the right temperature - which was a false accusation - giving residents the wrong menu information, giving a resident two glasses of water, and calling her lazy and a "Jalisco." Blanco did not deny any of the above-described evidence of harassment. For the reasons specified by Counsel for General Counsel, Respondent violated the Act as alleged in paragraph 5(d) of the complaint.

Paragraph 5(e) of the complaint alleges that on or about April 6, Respondent issued Zaldivar a written warning. Counsel for General Counsel contends on brief that Zaldivar denied all of the allegations in this complaint; that Zaldivar did not receive the same training as other dietary assistants, and Blanco told employees that they were not allowed to help Zaldivar individually while Blanco told certain employees to help Castillo; that Tabora corroborated Zaldivar with respect to the commonplace acceptable practices she engaged in regarding leaving certain items out for the next shift after discussing it with them; and that Blanco, Castillo, and Rosales testified untruthfully about the warning being translated for the employees by Blanco. Respondent on brief argues that Zaldivar had more than the three written warnings permitted and yet Zaldivar was not terminated; and that Respondent proved that Zaldivar was "disrespectful and insubordinate." (Respondent's brief, page 17) The April 6 warning is a fabrication. It indicates that Montesinos was the employee who went to Blanco's office and complained. Allegedly Montesinos signed it. Yet Montesinos was not called as a witness by the Respondent. Neither Blanco nor Castillo denied that just before this fabrication Blanco told Castillo not to worry about Zaldivar because Blanco was "going to take care." Rosales demonstrated that she did not know if the warning had any merit when she gave an affidavit indicating that Blanco asked her to sign the warning, it was in English, Blanco did not translate it for her, she did not know what the warning said, and nonetheless she signed the April 6 warning. As Rosales testified, she always follows Blanco's instructions. Seeing what happened to Zaldivar, this may be understandable but in certain circumstances it is not acceptable. Blanco wanted Zaldivar to be untruthful in a grievance proceeding. So it is not a stretch for Blanco to want Rosales to sign a warning to Zaldivar without Blanco translating the warning for Rosales. Also Blanco wanted Zaldivar to sign the Santana warning even though Blanco knew that

Zaldivar did not agree with it. Zaldivar correctly assessed the situation for what it was when she wrote on the warning “The whole situation is fabricated in order to give me sufficient warning that will result in my termination.” Respondent violated the Act as alleged in paragraph 5(e) of the complaint.

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Paragraph 5(f) of the complaint alleges that on or about April 15, 2004 Respondent, by Dunwoody, threatened Charging Party Zaldivar with suspension and discharge and issued her a written warning. Respondent on brief argues that the tone of the letter is neutral, and not threatening; and that there is no connection between the letter of April 15 and the Santana grievance meeting on September 15, 2003. In view of the Respondent’s argument on brief the letter bears repeating. It reads as follows:

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As I mentioned in your last counseling session, you must adjust your attitude and demeanor in your work performance. It is imperative that you work as a team member and be respectful to your supervisor and your peers.

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The employees in the Dietary Department need your cooperation and help in making sure everything runs smoothly during your tour of duty. I believe we have been patient long enough to allow you to adjust to the new job. You must show me and your supervisor that you want to continue to work here. Anything short of that and we will be forced to take immediate corrective action including suspension and possible termination.

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As far as anything else going on, such as arbitration or appeals on your case, they may take a long time and you must prepare yourself for the eventuality that they may not turn out in your favor.

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Your job changed, but we did not reduce your salary or pay scale in accordance with your new job duties. You are still being paid at your old rate and receiving increases along with the other bargaining unit employees. [Emphasis added.]

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This letter has to be read in the context of Respondent, in punishment for Zaldivar’s refusal to lie for Blanco during a grievance meeting, unlawfully issued fabricated warnings to Zaldivar, removed her from her assistant supervisor’s job, unlawfully harassed her about false issues or nonissues, called her names, denied her the training that is given to others in similar circumstances, told other employees that they could not help her as an individual, and unlawfully issued Zaldivar her first negative evaluation in the about 20 years she has worked for the Respondent. When read in that context the underlined portions of the letter speak very loudly. The letter is not neutral. It is a threat. It places Zaldivar on notice that Respondent is aware that she has a “case” pending. It also threatens Zaldivar, who does not deserve such treatment, that unless she adjusts her attitude, becomes a team player (something she did not do during the Santana grievance meeting but something Respondent’s witnesses did in this proceeding) and shows that she wants to continue to work at Respondent, she will be suspended or terminated. Respondent violated the Act as alleged in paragraph 5(f) of the complaint.

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Paragraph 5(g) of the complaint alleges that on or about October 28, 2004 Respondent by Dunwoody and Blanco, denied Charging Party Zaldivar light duty work. Counsel for General Counsel contends on brief that while Dunwoody conceded that there have been a few cases where employees have worked on light duty status, Respondent made no attempt to find light duty tasks for Zaldivar in any department, at any of Respondent’s facilities; that Zaldivar credibly testified, without dispute, that she could perform light duty work at the facility for four hours a day, performing specified kitchen duties while sitting down, or since she had four hours of office work daily in her assistant supervisors job, she could do that; and that if she had not been demoted she could be working full-time at this moment. Respondent on brief argues that

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Zaldivar did not request light duty until October 28, 2004, which is over 13 months after the alleged event; that there is no connection; that even if there is a connection, Zaldivar failed to prove that light duty is feasible; and that Loechner testified that there is no light duty in the involved kitchen. As found above, Loechner is not a credible witness. Moreover Dunwoody testified that Hernandez worked light duty in the Dietary Department. Zaldivar's testimony that when she was a dietary assistant supervisor she had about four hours of work to do each day sitting down is credited. Dunwoody testified that a department head can recommend to him that an employee work light duty but the department head has to provide him with a list of duties and it has to be prudent and reasonable so that it does no place a hardship on the other employees. Blanco is the department head in question. She did not specifically deny Zaldivar's testimony that when she was a dietary assistant supervisor she had about four hours of work to do each day sitting down. While I can appreciate that Blanco, who participated in unlawfully removing of Zaldivar from her assistant supervisor's position, would not make this light duty recommendation to Dunwoody because Blanco did not want to work with Zaldivar as an assistant supervisor, that does not relieve the Respondent from its legal obligations. Respondent does not deny that after Zaldivar was demoted, Castillo performed work previously performed by Zaldivar. In other words, the work had not been eliminated. Respondent violated the Act as alleged in paragraph 5(g) of the complaint.

Also as alleged, by the conduct described in paragraphs 5(e) through 5 (g) above Respondent has discriminated, and is discriminating, against employees for filing charges or giving testimony under the Act.<sup>11</sup> Respondent admits that it received a copy of the January 15, 2004 unfair labor practice charge that Zaldivar filed with the Board. Also, as noted above, Dunwoody made it a point to mention "your case" in his April 15 threatening letter to Zaldivar.

#### Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) On or about October 2, 10, 12, and 15, 2003, on or about January 29, 2004, and on or about February 17, 2004, Respondent unlawfully issued Charging Party Zaldivar written warnings.

(b) In or about January 2004 Respondent issued Charging Party Zaldivar a negative performance evaluation dated September 30, 2003.

(c) On or about October 20, 2003, Respondent demoted Charging Party Zaldivar from dietary assistant supervisor to dietary assistant.

(d) Since on or about October 20, 2003, Respondent, by Martha Blanco, has been harassing Charging party Zaldivar and/or closely monitoring charging Party Zaldivar's work.

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<sup>11</sup> Even if Zaldivar was considered a supervisor when she filed the January 15, 2004 and later charges, the Board has also held that it is unlawful to retaliate against a supervisor for filing a charge with the Board. *General Services, Inc.*, 229 NLRB 940 (1977)

(e) On or about April 6, 2004, Respondent issued Charging Party Zaldivar a written warning.

(f) On or about April 15, 2004, Respondent, by Jesse Dunwoody, threatened Charging Party Zaldivar with suspension and discharge, and issued her a written warning.

(g) On or about October 28, 2004, Respondent, by Jesse Dunwoody and Martha Blanco, denied Charging Party Zaldivar light duty work.

4. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (4) of the Act:

(a) On or about April 6, 2004, Respondent issued Charging Party Zaldivar a written warning.

(b) On or about April 15, 2004, Respondent, by Jesse Dunwoody, threatened Charging Party Zaldivar with suspension and discharge and issued her a written warning.

(c) On or about October 28, 2004, Respondent, by Jesse Dunwoody and Martha Blanco, denied Charging Party Zaldivar light duty work.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily demoted and denied Charging Party Zaldivar light duty work, it must offer her reinstatement to her assistant supervisor position and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her demotion and from the date of her request for light duty, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will be required to expunge from its records all of the warnings found above to be unlawful, and any reference to the unlawful demotion.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, Hebrew Home of South Beach, Inc., of Miami Beach, Florida, its officers, agents, successors, and assigns, shall

<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## 1. Cease and desist from

(a) Issuing unlawful written warnings to Charging Party Zaldivar because she made truthful, favorable statements regarding an employee during a grievance meeting held under Respondent's collective-bargaining agreement with the Union, and with respect to certain of the warnings, she filed a charge against the Respondent with the National Labor Relations Board.

(b) Issuing an unlawful negative performance evaluation to Charging Party Zaldivar because she made truthful, favorable statements regarding an employee during a grievance meeting held under Respondent's collective-bargaining agreement with the Union.

(c) Unlawfully demoting Charging Party Zaldivar from dietary assistant supervisor to dietary assistant because she made truthful, favorable statements regarding an employee during a grievance meeting held under Respondent's collective-bargaining agreement with the Union.

(d) Unlawfully harassing Charging Party Zaldivar and/or closely monitoring Charging Party Zaldivar's work because she made truthful, favorable statements regarding an employee during a grievance meeting held under Respondent's collective-bargaining agreement with the Union.

(e) Unlawfully threatening Charging Party Zaldivar with suspension and discharge because she made truthful, favorable statements regarding an employee during a grievance meeting held under Respondent's collective-bargaining agreement with the Union, and she filed a charge against the Respondent with the National Labor Relations Board.

(f) Unlawfully denying Charging Party Zaldivar light duty work because she made truthful, favorable statements regarding an employee during a grievance meeting held under Respondent's collective-bargaining agreement with the Union, and she filed a charge against the Respondent with the National Labor Relations Board.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of the Board's Order, offer Dora Zaldivar full reinstatement to her former position as dietary assistant supervisor or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

Make Dora Zaldivar whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the Decision.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful demotion and all of the unlawful warnings, and within 3 days thereafter notify the Dora Zaldivar in writing that this has been done and that the demotion and unlawful warnings will not be used against her in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the

Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

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Within 14 days after service by the Region, post at its facility in Miami Beach, Florida copies of the attached Notice marked "Appendix."<sup>13</sup> Copies of the Notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since October 2, 2003.

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Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges a violation of the Act not specifically found.

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Dated, Washington, D.C.

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John H. West  
Administrative Law Judge

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<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

# NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully Issue written warnings to a supervisor because that supervisor made truthful, favorable statements regarding an employee during a grievance meeting held under our collective-bargaining agreement with SEIU 1199 Florida, and the supervisor filed a charge against us with the National Labor Relations Board.

WE WILL NOT unlawfully issue a negative performance evaluation to a supervisor because that supervisor made truthful, favorable statements regarding an employee during a grievance meeting held under our collective-bargaining agreement with SEIU 1199 Florida.

WE WILL NOT unlawfully demote a supervisor because that supervisor made truthful, favorable statements regarding an employee during a grievance meeting held under our collective-bargaining agreement with SEIU 1199 Florida.

WE WILL NOT unlawfully harass an unlawfully demoted supervisor and/or closely monitor her work because she made truthful, favorable statements regarding an employee during a grievance meeting held under our collective-bargaining agreement with SEIU 1199 Florida.

WE WILL NOT unlawfully threaten an unlawfully demoted supervisor with suspension and discharge because she made truthful, favorable statements regarding an employee during a grievance meeting held under our collective-bargaining agreement with SEIU 1199 Florida, and she filed a charge against us with the National Labor Relations Board.

WE WILL NOT unlawfully deny an unlawfully demoted supervisor light duty work because she made truthful, favorable statements regarding an employee during a grievance meeting held under our collective-bargaining agreement with SEIU 1199 Florida, and she filed a charge against us with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Dora Zaldivar full reinstatement to her dietary assistant supervisor job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Dora Zaldivar whole for any loss of earnings and other benefits resulting from her demotion from the position of dietary assistant supervisor and subsequent denial of light duty work, less any net interim earnings, plus interest.

5 WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful demotion of Dora Zaldivar and all the unlawful warnings, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the demotion and unlawful warnings will not be used against her in any way.

10 Hebrew Home of South Beach, Inc.  
\_\_\_\_\_  
(Employer)

15 Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

20 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602-5824

(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

25 **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.

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